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THE
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THE
LAW MAGAZINE;
OR,
QUARTERLY REVIEW
OF
Jurisprudence.

ART. I.—ON FINANCE.

FINANCE is not a topic of jurisprudence: and articles on subjects foreign to it must be, and are, rarely introduced into this Review. At the same time, we shall scarcely displease our readers by presenting an exceptional paper, which not only probes this scientific subject, but presents it in a phase both important and novel.

I.—A FEW WORDS ON THE BUDGET OF 1852.

The late Chancellor of the Exchequer, in the debate of the 3rd of December last, made an important declaration in favour of direct taxation as the logical sequel to free trade.

The right honourable gentleman, in a speech of signal ability, said that in producing the Budget, he had above all other considerations, to aim at the establishment of our "financial system on principles more adapted to the requirements of the time, and especially to the industry of a country pre-eminent for its capacity for labour." "I wish," he added, "after understanding from the result of the last general election, that the principle of unrestricted competition was entirely and finally adopted as a principle of our commercial code—I wish to consider our financial system in relation to our commercial system—to see whether they cannot be brought more in harmony together, and whether in bringing them more in harmony together, we may not remove many well-founded causes of discontent among the people."

These sound principles, avowed for the first time by a cabinet minister, entitle Mr. D'Israeli to the thanks of the industrial community; nor are they the less important, because they had so meagre an application in the details of the Budget, and were lost sight of in the wrangle of a debate on finance, in which financial principles were drowned in a din of petty details and a war of party rancour—a debate in which perhaps more was said, and from which less can be learned on the subject, than any on record.

We may, perhaps, be permitted to say, that the Budget itself was objectionable, inasmuch as it reduced a tax, perhaps of all other indirect ones, the least burdensome, and which it could profit no large class to remit; whilst it extended the area of a direct one, which it was unnecessary to have, and suicidal to ask for. Such were the proposals to reduce the malt-tax and extend the house-tax.

The reduction of the malt-tax would probably neither be as effective as was boasted by its promoters, nor as ineffective as it was denounced by its opponents. It could not relieve the farmer to any great extent: for the importation of foreign barley would always keep the price down, even if the demand largely increased. But the demand would not largely increase, because, first, the brewers could, as Mr. Lowe and others clearly showed, retain a large portion of the reduction; and because, secondly, if they did not, 16*d.* per bushel would make an insignificant fractional reduction on the amount drunk by the retail purchasers, who are the largest consumers. They who brew their own beer would, however, eventually reap a benefit to the extent of the whole 16*d.* per bushel, and this benefit to them was underrated. Still the benefit would be felt by those well off, rather than by the working classes, a very small portion of whom would be able to afford the purchase of the requisite materials for brewing, or possess skill and time to brew when they had them. It is in the nature of indirect taxes to a considerable extent to resist the general tendency of all taxes to diffuse and equalize their incidence; and it is very questionable whether the brewers and large dealers might not have retained nearly the whole of the reduction.

The house-tax is admitted to be a good mode of direct assessment; and to have doubled it on the present payers only would have been far less impolitic than to extend it to the class of persons about for the first time to pay the income-tax. It was, however, a political rather than a financial mistake. It was to array the whole body of ten to twenty-pound household voters against the government, and to influence their representatives accordingly. In the event of a war, it would have been a good resource, and cheerfully paid: in peace it was alike uncalled for and obnoxious. If it were necessary, the necessity sprang from an unnecessary reduction, and one which wholly failed to relieve those it was primarily intended to benefit; for whatever the farmer pocketed by the reduction of the malt-tax, he would have paid in the new house-tax. His exemption from the latter would have ceased. Every farm-house would have been rated as worth 10*l.*, and, accordingly, the tax-gatherer would for the first time have found his way into many a farmer's abode; and where he had hitherto paid a house-tax, it would have been doubled.

If the right honourable gentleman intended to confine himself to the infinitesimal instalment of the great principle contained in his Budget, it might easily have been effected: 1st, by retaining the malt-tax; 2ndly, by doubling the house-tax within its present area; 3rdly, by extending the income-tax as he proposed (with this claptrap distinction between fixed and precarious incomes); and 4thly, by a further extension of the property-tax to all the realized property, of whatever amount, for there can be no possible reason for stopping at 50*l.*, or at any minimum.

This would have enabled him to abolish the soap-tax, producing 1,043,000*l.*; the timber-duty, 324,000*l.*; the paper-tax, 928,000*l.*; together with one half of the duty on tea at once, 2,950,000*l.* There can be no question that these are all taxes which limit the consumption of articles which it is of the first importance to the physical, moral, and mental welfare of the industrious classes to promote.

The total amount of these repealed taxes and duties would thus amount to five millions and a quarter. The proposed

increase of income, property, and house taxes, together with the surplus in hand, would have fully justified, even if they be not equivalent to this reduction, and on the following sound though little recognised principle.

II.—INCREASED REVENUE FROM DECREASED TAXES.

We hold, that *under a system of finance, which taxes either the bulk of the articles essential to the comforts and necessities of life, or incomes, the remission of any one of those taxes must result in the increased consumption of others; and that in a degree nearly, if not more than, equivalent to the reduction.*

Under such circumstances, an immediate saving results to the tax-payer. He must either spend or hoard that saving. If he spends it, he does so on some other taxed article, which at once produces the result, or he spends it in the consumption of an increased quantity of the article, or some other article, which has ceased to be taxed; if he does this for some purpose of commerce, he must barter the untaxed article for something that is taxed; and so increases its production, and the tax derived from it. If he consumes the additional quantity of the untaxed article himself, he promotes its production, and those who are employed by this increased demand for it, will either themselves, or in the same indirect manner, spend their earnings in the purchase of other taxed articles. The truth of this principle of course depends on the great bulk of the articles of necessity being taxed, as they are under our present system, or on one which taxes property and incomes on a comprehensive scale.

This nature of taxes, when lopped off in one direction to grow out in others, is so important, and so often ignored, that it is worth while to give practical proofs of its truth.

The following table gives the gross total revenue, the amount of the Customs and Excise, separately stated, as well as the increases and reductions of taxes, during the last twelve years. These twelve years have been eventful to commerce and national progress. The figures are from the "Finance Accounts," made up to the 5th of January in each year; and the taxes repealed and imposed, are from the Parliamentary paper on Revenue and

Repeal of Taxes, lately moved for by Mr. Cardwell. Round numbers only are given: they suffice amply for comparison.

	Gross Receipt of Total Ordinary Revenue.	Excise.	Customs.	New Taxes Imposed.	Taxes Repealed.
	£.	£.	£.	£.	£.
1840	52,916,000	15,628,000	23,657,000	2,274,000 (a)	1,258,000 (b)
1841	53,596,000	15,477,000	23,821,000		27,000 (c)
1842	52,119,000	14,359,000	22,771,000	5,629,000 (d)	1,596,000 (e)
1843	56,709,000	14,612,000	22,850,000		411,000 (f)
1844	59,230,000	15,244,000	24,277,000		458,000 (g)
1845	57,799,000	15,463,000	22,007,000	23,000 (h)	4,535,000 (i)
1846	58,860,000	15,563,000	22,611,000	2,000 (k)	735,000 (l)
1847	57,203,000	14,430,000	21,824,000		344,000 (m)
1848	58,086,000	15,556,000	22,785,000		585,000 (n)
1849	58,131,000	15,537,000	22,483,000		388,000 (o)
1850	58,205,000	15,984,000	22,194,000		1,310,000 (p)
1851	57,401,000	15,984,000	22,373,000	16,000 (q)	1,043,000 (r)

(a) Customs, £1,060,000; Excise, £782,000; Assessed, £2311,000; Post-Office, franking, £118,000. (b) Postage. (c) Customs.

(d) Nearly all Property and Income Tax.

(e) Idem, Customs Duties.

(f) Customs, £126,000; Irish Excise, £240,000.

(g) Customs, £279,000; Insurances, Glass, &c. £179,000.

(h) Auctioneers' Licenses.

(i) Customs, £3,606,000; Auctions and Glass, £929,000.

(k) Meal and Flour.

(l) Customs. [The estimated increase from reductions of prohibitory duties on foreign sugar is deducted.]

(m) Customs.

(n) Customs.

(o) Customs.

(p) Customs, £331,000; Stamps, £520,000; Excise, bricks, £456,000.

(q) House Tax received this year.

(r) Assessed, window, £742,000; Customs, about £300,000 this year.

In 1852 there has been a further increase of no less than 978,000*l.* on the total net revenue of the year, although the following further remissions were made. From the Customs, 500,000*l.* were remitted (in addition to the 300,000*l.* in 1851), and yet the decrease was 65,000*l.* only in that branch. From the assessed taxes a further remission had been made in 1852 of 552,000*l.*, that being the balance against the Exchequer, after deducting the estimated house-tax from the amount of the

repealed window-duty; and which had not accrued in 1851. Nevertheless, the assessed taxes have decreased only by 186,000*l.* ! The Excise has increased by 263,000*l.*; the stamps, by 356,000*l.*; and the property-tax, by 204,000*l.*

See how remarkably this table shows the fallacy of assuming a direct relation between *taxation* and *revenue*. They are entirely distinct: the mere increase or decrease of taxes by no means determines the amount collected.

During the twelve years 1840-51, it appears that we have repealed taxes actually producing more than twelve and a half millions annually, and we have imposed, to meet the defalcation, less than eight millions, leaving a balance of 4,746,000*l.*; and yet notwithstanding, the actual receipt of revenue was 4,485,000*l.* greater at the end of the period than it was at the beginning! In other words, though the Exchequer has foregone four and a half million taxes, it is by that amount richer than it was before.

This gross increase of the revenue amounting to 9,231,000*l.*, is of course mainly owing to the increase of population by about 15 per cent.; so that the actual improvement in the productiveness of taxes, instead of 9,231,000*l.*, is about 1,293,600*l.*, the concomitant of lighter and *more direct* taxation. The semi-official pamphlet, entitled "Trade and Finances of 1852," omits any mention of the element of increased population; but it certainly should be taken into account; for the increased consumption thereby occasioned is no increment of wealth or result of lessened taxation.

A more triumphant proof of the truth of our doctrine could not, however, have been given.

This table exhibits also the habit we have acquired of perpetual and peddling changes of taxes. We seem to be everlastingly dressing and redressing our fantastic finances. Budgets are a sort of Lenten entertainment, and become the annual pantomimes of Parliament. In 1840 the Customs are increased. In 1842 they are diminished by much the same amount, and they are thenceforth frittered away piecemeal every successive year. The assessed taxes are increased in 1840, and diminished in 1850, while the Excise undergoes endless vicissitudes.

The deficiency of an income to meet our expenditure in 1841, was no less than 2,101,000*l.*; in 1850 there was a *surplus* of 2,493,000*l.*; the expenditure having in the interval slightly increased.

This enabled the Chancellor of the Exchequer to make a further reduction last year, of which the ultimate effects have not had time to develop themselves. And the reductions in 1851, in the foregoing table, are merely approximative.

If the table be looked at in detail, the operation of the principle laid down, becomes still more apparent.

The great reduction of Customs, it will be seen, took place in 1845, when 3,606,000*l.* were taken off sugar, molasses, cotton, wool, &c. The Excise duties on glass were also repealed; and next year 735,000*l.* was taken off the Customs, on the items of spirits, butter, silk, tallow, cheese; and in the same year, the revenue both from the Customs and Excise, again increased! They suffered a slight diminution in 1847, but increased in 1848, and have remained on the average undiminished; whilst the Excise has steadily increased. Thus does revenue often increase after the remission of taxes.

III.—THE FOLLY OF TEA AND OTHER CUSTOMS DUTIES.

Mr. D'Israeli might safely therefore have taken a bolder slice from the tea-duties, than his fourpenny and twopenny instalments of six years' duration. He might, with the adjunct additions before named, have taken it *all* off, perhaps even at once, with but little risk of a deficiency. His reason for tapering off an obnoxious tax on a chief necessary of life by such fine shavings, is worth a passing comment; for though the Budget of 1852 is defunct, the same principle may creep in and spoil another. In the first place, all small reductions of a tax on a commodity sold in retail quantities, are liable to go to the trade, and not to the consumer. Few grocers would diminish the price in proportion to the tax on a quarter of a pound of tea. Now the great bulk of tea is sold in these dribble quantities, and to that very class—the industrious—whose relief is chiefly sought, as the object of the reduction.

But Mr. D'Israeli says, it is entirely for the sake of the con-

sumer that he thus dilutes relief, and lowers the gradient of his sliding scale. The right honourable gentleman admitted,¹ that despite the duty of 240 per cent. per lb., no less than 71,466,000 lbs. were imported last year, though we only wanted 54,000,000; and that having communicated with the best-informed persons on the growth and trade of tea, he had arrived at the conclusion, that "*there can be no prospect* of any want of a supply of tea to this country." He knew, moreover, "very well, that there was a surplus left in China," even of the small proportion of the whole of its tea which is now designed for exportation. "*Still*" the right honourable gentleman apprehended, "that if there is a sudden demand," we shall not find the "consumer benefit in the manner we desire, while at the same time the revenue must suffer. It takes (he added) three or four years to make a tea-tree, and that is a point to be considered in dealing with these duties," &c. So strange a conclusion from such premises, is surely very illogical. Passing over the horticultural question, and the discrepancy of time between the growth of the tea-tree and the decline of the tax, on what conceivable ground can the consumer be said *not to be benefited* by a large remission of the duty, because there may not be a supply at first equal to his demand! Though he may not get all the additional tea he desires, why is it no benefit to him to get as much more as possible? If Mr. D'Israeli fears that the demand being greater than the supply, the price will be raised up to or above what it now is; in that event the demand will be checked, and the evil (if it be one) of a greater demand than supply will work its own cure: and there is no ground for apprehension on that score. But the tea revenue, he says, will suffer; but the tea revenue is meant to suffer; and the honourable gentleman, not only calculates on the amount of its suffering, but very greatly overrates it, as his predecessors have always done before him, when they adventured on loosening the fiscal screw. It is never sufficiently taken into account, that the money saved in the untaxed article will be spent in the purchase of something else taxed.

It having been once laid down and conceded, that our system of finance is to be in harmony with the principle of unrestricted

¹ *Times* Report, Dec. 4, 1852.

competition in trade, it is obvious that no part of our fiscal machinery can be maintained for any other purpose than revenue. Protection is dead; its dogmas are abandoned by its authors; and Mr. D'Israeli, with discreet candour, denounces them as "fallacies which his party have at least had the courage honourably to give up." Still less, in spite of the right honourable gentleman's sarcasms, are those "obsolete politics" "rampant" among his opponents. "Unrestricted competition" is only the substitution of two long words for two short ones,—and free trade is the "genius of the times:" an idol to which even Bucks farmers must bend the knee. A glorious consummation, and a right-noble victory!

But whether the new converts, be they farmers or financiers, are aware of the legitimate extent of the principles laid down by their leaders, is more than doubtful. If taxation is to respect free trade, and it is to be adjusted according to the acknowledged principles on which a revenue should be raised, *the Customs must be abolished*: for three-fourths of them act directly as a check on trade, and therefore directly at variance with the principle of "unrestricted competition." If, however, they cannot be sustained with impunity to commerce, still less can they be justified as a means of revenue.

The conditions of a good tax are that it shall neither hurt morals nor health, be capable of complete collection, and economical; or, in the phrase of political economists, such that "it takes as little as possible from the tax-payers, beyond what it brings into the treasury of the state." Now, Customs unhappily comply with no one of these requirements. They injure health, for they induce adulterations of food; they are immoral, because they create smuggling; for the same reason they are not, and never can be, completely collected; and they are, of all the large branches of revenue,¹ by far the most costly and wasteful in their passage to the Treasury. In 1851 the collection of the stamps cost 144,000*l.*, or £2. 2*s.* 8*d.* per cent.; the assessed and property taxes, 308,000*l.*, or £3. 6*s.* per cent.; the Excise cost 849,000*l.*, or £5. 6*s.* per cent.; while the Customs cost

¹ The Post Office is the only one which costs more per cent. owing to the low charge for postage.

1,290,000*l.*, or £5. 15*s.* per cent.¹ Some millions more are paid on the articles swollen by adulterations, none of which reaches the exchequer. We shall recur to this overlooked fact again. Therefore, if the Customs cannot be defended on the ground of protection to trade, they are indefensible.

IV.—IF THE CUSTOMS GO, SO MUST THE EXCISE.—OBJECTIONS ANSWERED.

It would be unjust to emancipate foreign and colonial produce, and reserve a tax on the home produce of the same articles, which compose nine-elevenths of the whole Excise.

To repeal the Customs duties only on other things, such as tea, silk, &c., which are not made here, and retain it on those which are made here, such as spirits, paper, malt, soap, &c., would, independently of the violation of unrestricted competition, involve the same machinery and staff of coast blockade, revenue cutters, custom-houses, officers, searchers, *et id genus omne*, for which we now pay the nice little sum of a million and a quarter per annum. This would be too much even for the palate of a Protectionist; at any rate, for his pocket.

Thus a free-trade financial system involves the abolition of Customs and Excise, and a resort to direct taxation as a substitute. Nor are these mere financial inferences; they are corollaries of the main proposition; to which there is no logical answer, and from which there is no practical escape.

Before entering on the question of direct taxation, it is expedient to grapple with one objection to this scheme of finance, compared with which all others are unimportant and easily answered.

If the Excise and Customs duties are repealed, spirits will be so cheap that drunkenness will be increased,—a grave objection indeed, if it be so.

The first answer is, that it is now cheaper to get drunk on spirits than on beer. This, however, fails to answer the objection completely, though it spoils some of its force. It does not follow that more people would not take advantage of still

¹ These sums represent merely that part only of the cost of collection which figures in the "Finance Accounts."

greater facilities for getting drunk ; but what are the facts ? Abroad, where spirits are very cheap, there is not a fourth part of the drunkenness we have in England. In proportion as spirits have become cheaper, the people have become more sober. Our late honoured and excellent friend Mr. Porter demonstrated this. The evidence of several witnesses before the recent Committee of the House of Commons on wines, also bore convincing testimony to the same cheering fact. Our extensive acquaintance with the habits of the working classes in some of the most demoralized districts, confirms it. A taste is growing, not only for wine instead of spirits, but where two working men drank tea some ten years ago, three drink it now. One wine-seller in the Strand declared before the committee, that he sold three pipes of wine over the counter every week to retail purchasers. We attribute this entirely to the greater cultivation of the minds of the people,—to a growth of higher tastes and better habits,—to a keener sense of their own interest in sobriety,—and to the incipient spread of a sound religious spirit, of which the germs are being fostered by a small band of hearty clergymen and others, who really strive to approach the working people in their own way, and to put what they say and preach into homely language, and bring themselves down to a level with working men's feelings and modes of thought. We believe the slight progress we have made in providing rational recreation and glimpses at arts and sciences for the industrious classes, are so many helps on the same road. We look upon Crystal Palaces, and all kinds of institutions which raise the mind from God's blessings to God's goodness and greatness, and give the working millions useful things to see, and great facts to think of, as so many aids to moral elevation, and so many blows to beer-shops ; especially if such sights and resources are open on days when the working classes have holiday, which are certainly less desecrated by idleness and sensualities than they used to be within our own experience, when hard-working people had no other places to resort to than streets or churches, to which the bulk of them never went, and public houses, to which they always went.

Hurrah for education, and there will be little danger of gin !

Some people suggest heavy licenses for the sale of spirits. The present licenses are so low that there is no check whatever imposed by them. A first-rate country inn is charged perhaps 15*l.* per annum. It is assessed on the amount of its rental. If the enormous tax on spirits, wine, and malt liquors were taken off, it would be practicable, and certainly expedient, to raise the licenses for their sale. The objection to doing so, as a very intelligent supervisor of Excise told us lately, is the premium it would afford to illicit sales of spirits, and if it were attempted to prevent this by penalties, either the penalties must be so low as to fail in deterring the offence, or their enforcement would fill the gaols with offenders who could not pay them. Probably there is this dilemma (much exaggerated) in this statement. At any rate, the difficulty of enforcing higher licenses must be diminished in proportion to the cheapness of the liquors licensed. Few mere practical men, so called, can adapt the results of past experience to the altered circumstances of a prospective system. The only question is, to what extent the licenses should be raised; and this is mere matter of detail.

So much for the moral objection to an abolition of Customs.

The first financial objection is that by means of Customs duties, part of them is paid by foreigners.

In page 407, vol. ii., of Mr. James Stuart Mill's "Political Economy," edit. 1849, is the following paragraph, extracted from some other work (we will not stop to inquire by whom written); for marvellous as it may appear, it is indorsed by himself! The writer having taken cloth and linen as representatives of exports and imports in general, argues that a Customs duty on either is partially borne by foreigners. The argument as relates to both is nearly the same, and it will suffice to take that which relates to import duties, which are the most important. He says:—

"Instead of taxing the cloth which we export, suppose that we tax the linen which we import. The duty which we are now supposing must not be what is termed a protecting duty, that is, a duty sufficiently high to induce us to produce the article at home. If it had this effect, it would destroy entirely the trade both in cloth and in linen, and both countries would lose the whole of the advantage which they previously gained, by exchanging those commodities with

one another. We suppose a duty which might diminish the consumption of the article, but which would not prevent us from continuing to import, as before, whatever linen we did consume.

"The equilibrium of trade would be disturbed if the imposition of the tax diminished in the slightest degree the quantity of linen consumed. For as the tax is levied at our own Custom-house, the German exporter only receives the same price as formerly, though the English consumer pays a higher one. If, therefore, there be any diminution of the quantity bought, although a large sum of money may be laid out in the article, a smaller one will be due from England to Germany: this sum will no longer be an equivalent for the sum due from Germany to England for cloth; the balance, therefore, must be paid in money. Prices will fall in Germany and rise in England; linen will fall in the German market; cloth will rise in the English. The Germans will pay a higher price for cloth, and will have smaller incomes to buy it with; while the English will obtain linen cheaper; that is, its price will exceed what it previously was by less than the amount of the duty, while their means of purchasing it will be increased by the increase of their money incomes."

"The Germans will pay a higher price for cloth, and will have smaller incomes to buy it with!!" Then, is it not self-evident that such a state of things cannot last? But the whole hypothesis is that of an exceptional case from beginning to end, with the exploded sophistry about money incarnating the whole.¹

"If, therefore," says the authority Mr. Mill cites, "there be any diminution of the quantity bought (in England), a smaller sum will be due from England to Germany; this sum will no longer be an equivalent for the sum due from Germany to

¹ As a practical fact as well as theory, money never passes between nations, unless it does so owing to a difference in the exchanges and value of the precious metals, which makes it, like any other commodity, profitable as merchandise. The moment a sufficient quantity comes from the country having it to spare, into the country which wants it, the relative values in each are thereby altered, the equilibrium restored, and the transit and merchandise of it stops, because it is no longer profitable to continue it. There is so great a facility in the transit of coined money or bullion, owing to the proportion of value to bulk, that these changes in value suddenly begin and speedily end; and therefore is it that such species of traffic is always transitory and exceptional. As a rule, nations exchange goods, and not money, by medium of bills, notes, &c. The total amount of money which ever passes from one nation to another is an infinitesimal fraction of the whole amount of our international exchanges. Imports are paid for by exports, and exports by imports. If any one doubts this, and has no time to study the really sound political economy writers, let him go into the counting-house of the first merchant's office in the City he comes to, and inform himself of the facts.

England for cloth, the balance *must* therefore be paid in money." Then Germany would very little longer continue to take that amount of cloth, for the best of all reasons, because she could not afford it. That the balance against her "*must*" be paid in money, is a fallacy already answered. In nine hundred and ninety nine instances out of a thousand it would be paid in bills, which are ultimately cashed in some kind of German goods. But whether they repay us in goods or in money, is it not equally part and parcel of the case put, that our cloth is made dearer to Germany by an import duty? We are told so in so many words: "The Germans will pay a higher price for our cloth." Then if so, they will cease to take so much; but take only what is an equivalent for what we take in return, whether it be goods or money. But the argument is, that though we diminish our purchase of goods from them, they will continue to take a larger value of goods from us. Now, if this be so, what becomes of Mr. Mill's own axiom: "Every tax on a commodity tends to raise its price, and *consequently to lessen the demand for it in the market in which it is sold?*" (p. 402). Is this sound principle operative only in England? Is it not precisely the same in Germany? And is it not precisely the case put above? The import duty we impose on German linens is to increase the price of our cloth to Germany. But the oracle from whom Mr. Mill quotes, although he admits that "the price at which the cloth can be sold in Germany will be augmented," goes on to say that this augmented price "may not diminish it (the quantity consumed) at all, or so little, that in consequence of the higher price, a greater money value will be purchased than before!!"

"Money value," of course means exchangeable value; and in the case put, means that more linens will be given for less cloth: for linens are to "fall in the German market."

Certainly, if notwithstanding we raise the price of our cloths, whether by an export duty on them, or by an import duty on what we take in exchange, the Germans will, nevertheless, impoverish themselves by continuing to buy our cloths at a high price, and sell us their linens cheap; or, in other words, take less than they give in exchange—we shall be enriched thereby, and Mr. Mill and his authority have only (in spite of their own

axioms) to persuade the Germans to keep up this kind of barter to make Customs a source of boundless wealth to us; knocking, of course, all free trade on the head as a profound blunder.

Nor will this principle stop at the trade with Germany. If true there, so is it everywhere. It will apply equally to our trade with the rest of the world. So that we have but to perpetuate Custom duties, and every country with which we traffic will of necessity take our dear goods, and everlastingly give us their cheap ones, and money to boot, out of incomes rendered continually smaller by the process itself: so that not only will foreigners pay part of our taxes; but augment our wealth at their own perpetual loss!

That this is really no caricature of what Mr. Mill believes and professes, will be seen by what follows:—

“But the imposition of a tax on a commodity almost always diminishes the demand more or less; and it can never, or scarcely ever, increase the demand. It may, therefore, *be laid down as a principle*, that a tax on imported commodities, when it really operates as a tax, and not as a prohibition, either total or partial, almost always falls in part upon the foreigners who consume our goods; and that this is a mode in which a nation may appropriate to itself, at the expense of foreigners, a larger share than would otherwise belong to it of the increase in the general productiveness of the labouring capital of the world, which results from the interchange of commodities among nations.”

Long live Customs, if so it be! Mr. Mill indorses this theory in the following astounding passage:—

“Those are, *therefore*, in the right who maintain that taxes on imports are partly paid by foreigners; but they are mistaken when they say that it is paid by the foreign producer. It is not on the person from whom we buy, *but on all those who buy from us, that a portion of our Custom duties spontaneously falls*. It is the foreign consumer of our exported commodities who is obliged to pay a higher price for them, because we maintain revenue duties on foreign goods.”

“Obliged to pay a higher price” he certainly is; but what obliges him to buy the same quantity? If Mr. Mill will turn to his own theories on supply and demand, and the relation which price has to both, he will see that the foreigner not only will *not*, but *cannot* buy the same amount. One nation can no more continually incur a loss in its trade with another, than can one

merchant or shopkeeper with another. And Mr. Mill and his oracle have themselves supplied, in the two last paragraphs quoted, the most conclusive *ad absurdum* proof of this fact which it were possible to give.

Therefore, the German does *not* take a higher equivalent value of our cloths, than we take of his linens; and, therefore, he neither "must," nor does give us money in addition; and therefore, we not only get fewer linens for our home use, but have our own self-imposed duty to pay into the bargain, by our system of Customs. True it is, that the Germans and any other foreigners whose goods we thus tax, are injured by the process; inasmuch as their trade is circumscribed, and their profits, *pro tanto*, diminished; but is this a gain to us? Do they, therefore, pay part of *our* import duties? Just as well may the man who sets his own house on fire, say that his next-door neighbour bears part of his expense, because his house is burnt also, and he shares the loss sustained. There is no doubt, that Customs duties tend to impoverish the whole commercial world, and enrich nobody. That they cannot enrich one alone at the expense of another might be supposed to be sufficiently obvious from the bare fact, that were it so, other countries might retaliate, and impose their import duties also—which is precisely what they have done—in true accordance with that Ishmaelite policy by which nations antagonize interests that God made common.

It is to be lamented, that fallacies which would be natural and innocent in the speeches of a Booker or Sibthorp, should derive a false importance from the respectable sanction of Mr. Mill. It is still more unfortunate that the authority and weight of his acute mind and thoughtful opinion are opposed to the policy of direct taxation; so that its claim to adoption can alone be made good on the ruins of his argument against it. His popular and influential work, and his evidence before the property-tax committee, which we opened in the full expectation of finding our views fortified, and their expression rendered needless, has, on the contrary, suggested the utility of publishing them.

V.—ON DIRECT TAXES.

Among the great benefits of direct taxation is its far greater economy in three ways. In the first place, the people would save nearly the whole amount (2,000,000*l.*) now spent on the levy of Customs and Excise. Therefore, by nearly this amount would taxation be decreased. But there would be another gain, not always borne in mind. The consumers of indirectly-taxed articles pay much more in addition to the value of the article than the actual duty, the price of the goods being always augmented by more than the tax. Mr. Mill admits this.

There is a third advantage, and that is the diminution, if not removal, of the present irresistible inducement to adulterate food, &c. which the tax creates. It is notorious that this adulteration is extending to almost everything we use, from necessaries to luxuries, from tea to tobacco, from coffee to cayenne. The import and excise duties on articles of food are the great cause of this pernicious and abominable destruction of health and life,¹ and we do not know a stronger reason for their total abolition: and is it not right to classify this among the economical arguments for that measure?—For what is a more costly misery than injured health, with its train of wants, agonies, and impoverishments? Add to this the price charged for the spurious additions, which always includes the tax, though it never reaches the exchequer. We repeat that this is a very large item.

Mr. Mill fears that though the dislike is “*puerile*,” the tax paid directly to a tax-collector would be more unpopular and obnoxious than indirectly by the enhanced price of goods! What although the amount were known to be less? We do not believe that the people of England are “*puerile*,” and they must be utterly senseless to entertain any such dislike. The very general and rapidly growing popularity of direct taxes is, however, now openly declaring itself. We have asked many working-men, as well as tradesmen, about it, and find no aversion whatever to direct taxation; but, on the contrary, a strong and growing feeling in its favour. Nor do we find that the “*inconvenience*”

¹ About twice as much gin is sold as is imported or made, the addition being a compound of vitriol and spices.

of paying taxes is likely to be a bit more felt when paid every half-year, than when it is being paid in dribblets on the goods used every day. If it be really the effect of the substitution of direct for indirect taxes, that for every pound the contributor has to pay in direct taxes, he saves twenty-five shillings in indirect ones, the working classes are quite shrewd enough to find their interest in the exchange.

Another strong argument for raising taxation by direct means is, that none can escape them; like the contributor who ceases to use a taxed commodity. Mr. Mill thinks this a fallacy, because he says, in the case of wine, for instance, though it is true that the consumer may cease to drink it to the extent of the 5*l.* tax he would otherwise pay on it, yet "if the 5*l.* instead of being paid in wine, had been taken from him by an income-tax, he could, by expending 5*l.* less in wine, equally save that amount of the tax; so that the difference between the two cases is illusory." Quite so; if we have the tax on both: but suppose we do not, and levy it wholly on income, property, or such sources of revenue as admit of no escape. Mr. Mill's objections to direct taxation are really objections to imperfect and piecemeal direct taxation, such as the late Budget, and against such are they alone formidable.

"The decisive objection" (elsewhere he terms it "insuperable") to raising the whole, or the greater part, of a large revenue by direct taxes, Mr. Mill says, is "the *impossibility* of fairly assessing them" (p. 423, vol. ii.). The best answer to this is, that the income-tax, to which he specially refers, has, in the whole, been found to work very fairly. The objections to its fairness were indeed frequently made before it was tried, but a few years have removed this complaint, by that best of all tests—practical experience. True it is that knavery in some instances, understates its income and underpays the tax, and that vanity, in quite as many, overstates and overpays it:¹ but there are defects in the collection of every conceivable kind of tax. It is as fair an approximation to justice as is practicable. The amount has been calculated by accurate and experienced actuaries, who are of opinion, that the receipts realize about

¹ If so, according to Sismondi, vanity is the best of all things to tax.

what might be expected from the probable incomes of the taxed classes. Mr. Willich, one of the ablest, estimated it in 1842 at a million less than it has realized. It is a most useful achievement, for, saving new cases, the tax collectors and commissioners know the gauge of each man's income, and the amount he ought to pay.

We have now a scale to go by; the amounts of income are either ascertained, or reduced to a standard easy to be ascertained; it is now a mere question of what per-centage they ought, under a system of direct taxation, to be assessed at, and whether the area of it should be extended.

There is this great consolation in imposing a heavier income-tax; namely, that if, as Mr. Mill lays it down for certain, the generality of tax-payers will palter with their consciences and understate their incomes, this fraud will be redressed by a rate of increase higher by the amount of that understatement, so that the state would not be a loser, or the fraudulent public gainers. But it is not so. The evidence is ample, that Mr. Mill is wrong in his estimate of public morality. The tax has been, on the whole, fairly and fully paid; and complaints of injustice and inequality are no longer heard. This "insuperable objection" being overcome, we may avail ourselves of Mr. Mill's opinion, and entirely concur that an income-tax should exempt no incomes above 50*l.* per annum, there being, according to the plan we incline to adopt of abolishing the Excise and Customs, no taxes left on the necessities of life. 50*l.*, Mr. Mill thinks, represent the "smallest income" which a labouring family ought to have, and the government ought not to be a party to making it smaller. It is on totally different grounds that we arrive at the same exemption; namely, the extreme difficulty there would be in collecting the tax from incomes below 50*l.* It is also on this ground that we think Mr. A. Alison's scheme¹ is impracticable, as regards the assessment of 18,000,000*l.* on wages. He proposes to do this by charging the tax on the employer. He may spare himself the trouble; he has but to tax other classes, and the labourer will of necessity bear his share. This conclusion is indeed at variance with

¹ See his pamphlet, "Universal Free Trade," p. 12.

the principles laid down by many economists; and is submitted, with deference, to the judgment of the public, on the following grounds:—

VI.—THE SELF-EQUALIZING INCIDENCE OF TAXES.

No one questions that men should be taxed according to their means: and nine-tenths of our financiers are racking their wits to devise plans for effecting this. We rank with the very meagre minority who think that they may save themselves the pains, and that taxes apportion themselves to each man's means, and need no artificial adjustment at our hands: the reason being that prices, profits, salaries, wages, and rent, are necessarily affected by the taxes each has to sustain. A tax enters into the value of all commodities, services, labour, and usufruct of capital; for whatever is highly taxed, is to that extent highly priced, and the incident of taxation is universally diffused.

M. Thiers, one of the keenest and most advanced intellects of the times, has promulged this view in his recent work, entitled "*De la Propriété*," under the head "*De la Diffusion de l'Impôt*." He says, "*Que l'impôt se repartit à l'infini, et tend à se confondre avec le prix des choses, au point que chacun en supporte sa part, non en raison de ce qu'il paye à l'état, mais en raison de ce qu'il consomme.*" And he extends this principle of self-diffusion, to direct, as well as to indirect taxation. Now if this is true, what becomes of the use of all the laborious efforts about "*discriminating taxes*," and of the profound problems whereby so many learned actuaries and accomplished statesmen are striving to cope with the vicissitudes of income, and apportion public burdens to inequalities of profit? If it is true that the emoluments of professional men must be affected by taxes, however exclusively laid on those who employ them, to the same extent as if those taxes had been shared by them, what is the value of all the complex calculations, and touching appeals to justice, whereby it is sought to create distinctions between permanent and precarious incomes? An Edinburgh reviewer well says, "*It is altogether immaterial to professional men whether, when a tax is laid on income, they pay their full share, or obtain a total exemption.*" * * To give abatements in their favour serves

only to introduce an inequality into the tax, and to render its collection more difficult, without doing them any real service. If you give them an abatement, their fees will be diminished, and if you do not give it, they will be raised; so that in either case, they will preserve the same relative situation with respect to the other classes of society."¹

According to Mr. Mill,—and the idea seems to pervade and mould everything he writes on the subject,—from the very moment a tax is imposed, directly or indirectly, on any class of persons, their incomes are lessened by that precise amount or more, and the incidence of the burden rests exclusively on their shoulders. He, and some other political economists, seem to be perpetually haunted with a dread of inequalities of taxation, which will result in unequal sacrifices. There can be no doubt that it is possible to select articles for taxation, so essential to one class of the community, and so little needed by others, that such inequalities might at any rate, for a time, exist. But a very little practical knowledge of the great relations of industry, commerce, and capital, will show the unsoundness of such sweeping assertions, for example, as these:—"A tax on rent falls wholly on the landlord. *There are no means* by which he can shift the burthen upon any one else."—Mill, vol. ii. p. 370. An income-tax confined to "realized property, in which form it certainly has the merit of being a very easy form of *plunder*."—Idem, p. 424.

If the landlords be thus additionally charged with a new tax on rent, the *immediate* effect will be to relieve tenants, and also the consumers of their produce, of a proportionate burden of taxation hitherto imposed on them; at any rate, the proportionate incidence of the public burden is no longer as it was. The farmer is relieved in his own expenditure, and so are his customers, and their customers, and his profits and theirs are thus increased. Unfortunately for Mr. Mill's argument, there are few leases, so that he is bereft of the slight checks from that "disturbing cause" (to use one of Mr. Senior's apt phrases), which would otherwise defer the operation which, we contend, now speedily takes place. For in a country like ours, where the

¹ *Edinburgh Review*, vol. xxxix, pp. 13, 15.

search for the profitable employment of capital and industry is keenly alert, and where increased competition for land is ever at the heels of increased profits from its possession, the value of land and its rental is quickly changed; and the speedy result of rent being taxed is, that rent is raised: and this new burden, which we are told *cannot be shifted*, inevitably shifts itself. This error of Mr. Mill's is borrowed from Dr. Chalmers.¹

We do not advocate an exclusive tax on "realized property." But if we were so disposed, it could be shown that by a similar process of self-equalization of public burdens, such an apparently unfair imposition of them would soon be necessarily shared by other classes of capital,² trade, incomes, and industry. For

¹ "The incidence of such a tax is altogether upon the landlord. He is made poorer by it; but no other individual or order of the community needs to be at all affected by it."—*Political Economy*, p. 242.

² We use this term here advisedly. The realized property which the immediate possessor merely invests is frequently "employed in the business of production," as Dr. Chalmers defines capital, and is "that portion of the stock of a country which is kept or employed *with a view* to profit in the production and distribution of wealth," as Mr. Malthus rather largely and loosely terms it; and is part of that "produce of the country devoted to production," as Mr. John Mill more tersely and correctly calls capital. Very few propertied people actually have their own property. If it is in land, they usually let it, and receive the rent; if in funds or shares, they receive the dividends, which constitute their incomes; in other words, credit for so much of the commodities of the country for their use. Industry of some kind is really and actually employing what they call their property, and continually consuming and reproducing it. This is true even of land, speaking of all that is of use in land, namely, its productive power. Realized property is thus not only capital, but circulating capital. Let the reader but follow out, step by step, what actually happens to realized property, where it goes and who uses it, and he will soon have juster and clearer views on the subject than half the political economists who have obscured the subject with their expositions. They will perceive, not only what is the fallacy of arguments *against* direct taxation in opposing theories, but the folly of arguments *for* it on such silly grounds as these, advanced by a tract-writer, who ought to know better:—"The chief objections to indirect taxation rest * * * on the premium which it offers to the privileged classes to withdraw their capital and themselves from the offices of production, to live partially or entirely in idleness. One man (say A.) may have 52,000*l.* a year, being a thousand times more than him (*sic*) who has only 52*l.* a year, or 1*l.* a week (say B.); but the first does not eat a thousand times more food, drink a thousand times more tea or coffee, or taxed liquor, pay a thousand times more for his window-lights, &c., nor in any shape contribute a thousand times more to the revenue than the second." But B. who uses and profits by his capital does, and that is the same thing. Besides, A. must spend his 52,000*l.* per annum on taxed articles, under such a system, and does pay his share of taxes. The whole argument is based on fallacy.

if realized property be thus disproportionately taxed, and the non-owners of realized property relieved, the price now paid, whether in interest, rent, or dividends, for the use of that property, alias for capital of all kinds, would be very soon raised also. The burdens which now press on and impede production¹ would be laid on the possessors of the raw material of production (if we may be allowed so to term it). The profits of the producer would be increased, and of the owner of the raw material, lessened. Thus the latter would rise in price, that is, marketable value. If so, a tax on realized property cannot be a mode of plunder. Is it in fact more than the shifting of the *primary* incidence of a common burden from the streams to the source of wealth, attended by some economies not inconsiderable in the aggregate amount?

No one more appreciates the intimate relation between capital and industry, capitalists and producers, than Mr. Mill himself; and yet he seems to overlook the sequence from premises and principles so clearly put as these:—

“As whatever is of the produce of the country devoted to production is capital, so, conversely, the whole of the capital of the country is devoted to production.”

And he elsewhere says:—

“Capital is kept in existence from age to age, not by preservation, but by perpetual reproduction: every part of it is used and destroyed, generally, very soon after it is produced; but those who consume it, are employed meanwhile in producing more. The growth of capital is similar to the growth of population.” “Whatever” (he says elsewhere) “is spent, cannot but be drawn from yearly income * * * the whole and every part of the wealth produced in the country forms or helps to form the income of somebody.”

If all this be true,—and most true it assuredly is,—a disproportionate burden thrown on one branch of interests thus interwoven and dependent, must as surely be shared by the rest as water finds its level: though not so speedily. And it is because the equalization of the incidence is not so speedy; and that this transfer of the burden would produce dislocations of existing

¹ That direct taxes do this, has been demonstrated by almost everybody who has written, spoken, or testified on the subject.

arrangements and contracts; that it is more politic and even more just to impose the burden more widely at first, and to forestall its natural expansion, instead of levying the whole of the revenue on any one class, making it banker for the rest; and subjecting it to the process of reimbursing its coffers.

VII.—LABOUR NEED NOT BE TAXED.

For these reasons we would tax all incomes of 50*l.* and upwards, and except all below it; because there would be great difficulty in ascertaining their amount and collecting the tax. We would also except the wages of labour on the same ground, and certainly not on the fallacious one, that labour should be exempted from its fair share of that public burden, which is either a common benefit or a common duty, partly the one, and partly the other; for we are well persuaded that, in the first place, by no possible adjustment of taxation, is it practicable to exempt it from the burden, however easy to exempt it from the tax. Secondly, it ought not to be done; because it is the duty of a labourer, as much as any other man, rich or poor, to bear his share of the debt owed by the community, of which he is a member, and also to contribute to the protection which the state affords to his industry. Patriots should not court popularity by ministering to the clap-trap fiction that the working man should be freed from his share of the public burdens. He neither can be, nor ought to be, freed from them; and the only means by which they can be lightened to him, are the same whereby they may be lightened to every other member of the community; namely, by an increase in the means of paying them, or in a diminution of their amount: in other words, by more production, or by less expenditure. All other modes of relieving the industrious classes from taxation, or its proxy, are mere hocus pocus. It is full time that public men should renounce such arrant delusions, and that reformers should learn to be financiers.

If any one doubts that the imposition of taxes on the non-labouring classes, however exclusive, and the repeal of every kind of tax now paid by the labouring classes, however indirect,

would, *cæteris paribus*,¹ decrease the labour fund, and be followed by a lowering of money wages, he has not only to learn the rudimentary and thoroughly practical laws which inflexibly govern supply and demand, but he arrays himself against the theories, expressed or implied, of every economist of note who has ever written on the subject. In effect, therefore, the labourer would have the same value in goods he had before; but he would at first gain nothing, and the employing classes lose nothing. The former would receive less, and pay less; the latter would give less for labour, and pay more for taxes. Incomes would be proportionately affected, and all consumers of produce, into which labour enters, by a similar reduction of prices. This is not only a probable inference, but it is a mathematical sequence from the following unanswered and unanswerable propositions:—

“It is well known,” says Mr. Malthus, “that the quantity of money, of corn, or of the necessities and conveniences of life which is awarded to the labourer, is subject to great variation, all dependent upon the demand and supply of these objects, compared with the demand and supply of labour.” * * * “If, either from the scarcity of money, or the plenty of labour, a greater sacrifice must be made to obtain the given quantity of money, the money price of labour will fall.”

This is exactly what would happen by the shifting of taxes to the non-labouring classes; inasmuch as they would have more to pay in taxes, they would have less to pay in wages. “Money,” of course, means no more than the necessities and conveniences of life, which it represents and measures. Of these the employers and consumers of labour would have less to give by the amount they paid in taxes.²

¹ Capital and *productive* population remaining as before. If the proportion between these be changed, wages will of course be altered accordingly; just as they would vary with a variation of industry and skill, and the wealth resulting from them or any other disturbing cause. But such disturbances would be quite foreign to the effect of a shifting of taxation, such as we are discussing, and would take effect independently of it. It is therefore perfectly in keeping with this argument, that the value of wages should be raised by this shifting of taxes, supposing that thereby the capital of the community were increased or economized, as it would be.

² That taxes are paid from the same primary fund as wages, is so obvious that it scarcely deserves a note. The tax-gatherer, even, when he knocks at the door of a real-propertied man, does not receive a bit of

Adam Smith broadly lays it down that—

“The middling and superior ranks of the people, if they understand their own interest, ought always to oppose all taxes upon the necessities of life, as well as all taxes upon the wages of labour. The final payment of both the one and the other falls altogether upon themselves, and always with a considerable overcharge.” (B. & C. 2, p. 333).

Therefore, take taxes off these necessities of life and wages of labour, and the final payment of them by the other classes will be made *without* overcharge. Adam Smith also says:—

“The money price of labour is necessarily regulated by two circumstances,—the demand for labour, and the price of the necessities and conveniences of life.”

Now the price of the latter would be lowered by the shifting of taxes from commodities to incomes and property. If they and the assessed taxes bore the burden, commodities would be freed from it. Hence there is another reason concurrent with the former, or rather part of it, why money wages would fall.

Dr. Chalmers admits that “many are the instances in which it is quite palpable that the first incidence and the ultimate effect of a tax lie on different persons.” He is wrong, however, in inferring that because “all taxes affecting the status of the capitalists are made up for them by higher prices; and all taxes affecting that of labourers are made up to them by higher wages,”—this conducts us to the doctrine of the French economists (Quesnay, &c.), who hold that the whole incidence of taxation falls on land, and that it may be made to bear the exclusive burden! As far as taxes go in unproductive consumption, they are clearly a diminution of *all* wealth, and of the *whole* community, who, unlike paupers and prisoners, are purchasers as well as consumers.

The process by which the incidence is extended is not “compensatory,” but equalizing; not partial, but expansive. Land enforces the participation by the rent it exacts and compels. Say, more justly, terms taxes “a cause of the destruction of part of

land, or a house, or a carriage, but money, or some order exchangeable like money, for goods, which the army eats, the navy drinks, or the fundholder clothes himself with, just like the labourer,—the productions, in fact, of the country, its wealth or capital; it is immaterial which they are called.

the products of society. * * The *producers and consumers* pay the value of the products thus destroyed. * * Which, while they [taxes] render the products dearer, do not augment the incomes of the producers."

Taxes are a national necessity, but they are not the less a necessary evil. Dr. Chalmers, and more of his school, though they hold otherwise, and seek to veil an unpalatable fact from the people, for the laudable purpose of appeasing "rancorous politics," should not do so at the sacrifice of truth.

Mr. McCulloch puts the law which regulates wages very forcibly, thus :—

"The amount of subsistence falling to each labourer, or the rate of wages, must depend on the proportion which the whole capital bears to the whole labouring population."

And again :—

"He [the labourer] will always receive such a sum as will suffice to put him in possession of the portion of capital falling to his share."

Now if the whole of that portion of capital consumed as taxes be taken from it, before the labourer gets his share, and he has none to pay out of it, it is clear that that share will be smaller by the amount which previously came to him as wage, and he had to pay afterwards as tax. This is just what will happen if taxes are taken off commodities consumed by labourers, and laid on capital and incomes. It will lower the cost of production, which Mr. McCulloch justly says, "determines the natural or necessary rate of wages, just as it determines the average price of commodities."—P. 385.

Mr. Mill himself says, "Wages not only depend on the relative amount of capital and population, but cannot be affected by anything else;" and yet he blames those who say that the "argument for the income-tax, grounded on its falling on the higher and middle classes only, and sparing the poor, is an error."¹ He seems to take for granted that the income-tax payers would pay the new tax entirely, or nearly so, out of abstinence from unproductive consumption, thus stinting themselves of their enjoyments; and he arrives at the conclusion that "the capital which hitherto employed the labourers of the

¹ Vol. i. p. 104.

country remains, and is still capable of employing the same number. There "is the same amount of produce paid in wages, or allotted to defray the feeding and clothing of labourers." He then attempts a *reductio ad absurdum*, and asserts that, "if it is taxing the labourers to tax what is laid out in the produce of labour, the labouring classes pay all the taxes. The same argument," he adds, "equally proves that it is impossible to tax the labourers at all; since the tax being laid out either in labour or commodities, carries all back to them; so that taxation has the singular property of falling on nobody." It has the inevitable property of falling on everybody; and this is a fact to which Mr. Mill seems to shut his eyes. He says that—

"In consequence of the income-tax, the classes who pay it, do really diminish their consumption. Exactly as far as they do this, they are the persons on whom the tax falls. It is defrayed out of what they would otherwise have used and enjoyed."

He cannot see that it is not their consumption, but the cost of what they consume, that will be diminished.

Sir Robert Peel's tardy apprehension of great truths, at length opened to him a similar conclusion. He said in 1842:—

"If my whole plan be adopted, there will be a diminution in the cost of living, which will repay to the contributors of the income-tax a large porportion of the money they are called upon to advance."

Mr. Ricardo dimly sees the same principle, and tells us that—

"If such a tax as we are considering should in its operation be unequal, if it should fall particularly heavy on one class of trade, the profits of that trade would be diminished below the general level of mercantile profits, and those engaged in it would either desert it for one more profitable, or they would raise the price of the commodity in which they dealt, so as to bring it to produce the same rate of profits as other trades."

Mr. Mill has of late given some weight to the immense relief from the remission of taxes on commodities, which would result from the imposition of a tax on incomes, and the consequent cheapness of commodities to every class in the community.

In his evidence before the committee, he distinctly admits that "if there were no taxes but an income-tax, it would be fair to commence at as small a sum as 50*l.*, which would cover the necessaries of life, and to tax in all cases the excess above 50*l.*" "The class between 50*l.* and 150*l.* now pays," he thinks "a

disproportionate share of indirect taxes, inasmuch as the articles upon which those taxes principally fall are articles upon which a larger proportion of smaller incomes than of larger ones is expended." Answer 5262.—Do away with indirect taxes, and the objection falls to the ground.

Mr. Mill has yet to show how it can happen, that when the larger incomes have larger burdens to bear, and the lower classes a less burden, without any increased demand for their labour, the former, being employers and consumers, will reduce their own enjoyments and expenditure, in order to maintain the payment of labour unadjusted to the new relation between them. With what recognised principle of supply and demand, or with what laws which govern wages, is this phenomenon consistent? There is no doubt that the labourer will have the same amount of food and clothing. But does it therefore follow that the other classes will have less? or that any part of the burden of taxation will "fall definitively on the rich and not at all upon the poor?" We maintain—not that the poor will benefit at the expense of the rich—but that both classes and all classes will, as they have all along done, *share the burden*, with this signal difference—that by removing the imposition of taxes from consumption to income and property, and thus relinquishing indirect for direct taxation, *a material saving will be effected in the cost of collection and in the amount required. That manifold hindrances to industrial enterprise, alike vexatious and costly, arising from the multitude of petty imposts, will be removed, greatly to the benefit of commerce: whilst the abolition of all Customs and Excise duties will alone give effect to the principle of unrestricted competition and free trade, and make an admitted theory a practical reality.*

We do not wish to push the theory that the incidence of taxes is necessarily expansive beyond its just limits. We have admitted that it is possible to effect a partial incidence if taxes are imposed in the first instance on classes or commodities too limited in number or amount to shift the burden readily. We would guard against the possibility of this occurrence; and we are therefore anxious to vindicate the exemption of so large a portion as the labouring classes. But of all the causes of fluctu-

ation of wages, none are so immediate in their effects, as changes in the price of the articles necessary to the sustenance of the labourer. De Quincey well remarks, that—

“The rate of increase upon population, the changes incident to capital, the rational traditional standard of domestic life—all these are slow to move, and, when they *have* moved, slow to embody themselves in corresponding effects. * * * But the fourth element, the daily cost of necessaries, alters sometimes largely in one day; and upon this, therefore, must be charged the main solution of those vicissitudes of wages which are likely to occur within one man’s life.”¹

That acute and accurate statesman, Mr. Charles Villiers, said in a corn-law debate :—

“There remains in the expenditure of the people for food a difference of no less than ninety-one millions sterling between 1847 and 1849, as everybody must see; which must leave means available to the community for other objects, and which, from whatever cause it may arise, will always be felt in the trade and condition of the people.”

Let it be distinctly understood, that so far from labourers suffering in their worldly means from the operation of the effects of the system we propose, they would necessarily gain by it; through that immense stimulus and encouragement to every department of industry which requires their labour; and which would, quite independently of all other causes, raise the price of, with the demand for, labour; and, by the same operation, increase the fund for paying it. In perfect consistency with this, is the fact, that whatever be the rate of their wages, it will be always lower by the amount of the taxes, no longer paid by them.

The portion of wages which previously went in paying a tax on everything the poor man ate, drank, or wore, though he no longer gets repaid for it (ceasing to pay it himself), is like many other burdens which he can do better without, although he be no longer paid for bearing it.

So much for the truth of the principles whereby it is certain the incidence of taxes is self-adjusting and equalizing. We have now freed ourselves from the difficulties which every one encounters, who, chained to the current theories of taxation, attempts the Sisyphean task of equalizing its incidence by fiscal adjustment.

¹ “Logic of Political Economy;” a book of rare intellectual vigour and precision of language.

VIII.—THE FALLACY OF DISCRIMINATING RATES OF INCOME-TAX.

If there be any truth in our arguments, and soundness in our facts, it is easy to attach their proper value, not only to all attempts and schemes based on opposing fallacies, but to consign to their proper insignificance the conflict of bootless calculations and parade of statistical puerilities, which were inflicted on the income-tax committee, on the vexed question whether that tax should be on capitalized incomes or not. It follows, if the premises we have humbly ventured to propound are correct, that it cannot in the least degree matter whether the tax be levied on the one scale or the other, so long as there be but *one* system and *one* rate of payments. The absurdity of levying less on the incomes from trades and professions than on those from property has, we trust, been made sufficiently manifest. To do so is to create a distinction without a difference; for if the latter be more favoured, they will be less paid; and the burden will be as long in one case as it was broad in the other. The way in which injustice is really prevented is that so well shown by clear-headed Col. Thompson :—

“If temporary incomes are taxed temporarily, and permanent incomes permanently, that is exactly the fair thing.”

Here is the equalization of tax to income already provided for. Shrewd men like Mr. Warburton put this very plainly also to the committee; and must have consigned all gain-sayers to the tribe of clap-trap mongers; in the judgment at least of reflecting people.

In a word, we hold that the simplest mode of levying the tax is the best. It should, therefore, be confined to income, and bear uniformly upon it, without trenching on capital, or attempting to discriminate between the ever-fluctuating proportions of fixed and circulating capital.

It is the great merit of the present system, that all incomes are treated, classed, and taxed alike, whether they be perpetual or temporary, and whether produced by capital or not of capital. And this system ought not to be altered, for it cannot be improved. Some actuaries, and others who are afflicted with a phobia for arithmetical casuistries and the *apices juris* of the subject, set up a distinction between incomes derived from fixed

capital, such as the Funds, for example, and from circulating capital, or such as is employed in production. But they are, for all the purposes and equities of taxation, similar. True it is, that part of the income derived from the latter consists in the capital newly produced; but what of that? It still constitutes part of income; for it is part of the profit arising from the productive employment of capital,—the original amount of the capital so employed being left untaxed and undiminished. True it is that the process is easy of capitalizing incomes, and taxing 1,000*l.* per annum from the Funds, if in perpetuity, as 25,000*l.*, and of a life-interest in them of 1,000*l.* per annum at 14,753*l.*, and a professional income of 1,000*l.* as an annuitant also. But where is the justice of this proceeding? It is plain that the *income* in any of these cases survives from possessor to possessor just as much where he has a temporary individual interest as where he has it in fee. It represents so much of the annual wealth of the country, receiving the same protection from the State, and surely chargeable with the same obligations. Why is one 1,000*l.* then to be charged less than another 1,000*l.*? These varying scales are based on different prospective values of incomes. But nothing prospective should enter into the case. The tax is levied on a present income for a present benefit. Why, then, is not one possessor for the time being to pay the same tax for the same year's income as another? To read their evidence before the committee, it appears to be morally impossible for any actuary to confine his mind to present interests, and abstain from professional calculations of future contingencies. If they put a lower tax on life incomes in the Funds than on incomes in perpetuity, it is manifest that one part of the permanent income of the fixed capital of the country is to pay less than another: so that there would, as between the State and the tax, be a perpetual inequality upon the same income from the same capital, enjoying the same security! Again we ask *why*? The sole difference is, that one set of possessors succeed by different rights to others, each having the same enjoyment during their possession. It is really refreshing to turn from all these incomprehensible absurdities to the plain common-sense views expressed by men like Mr. Warburton and Mr. Babbage.

IX.—PLAN OF TAXATION.

We propose to abolish Customs and Excise duties, leaving all other sources of revenue as they are, and to substitute for those, an income-tax on all incomes, whether arising from real or personal estate, trades, or professions, of 9 per cent. in the first instance, to be diminished as the increase of the revenue may permit.

The amount now raised of entire revenue, is 57,401,000*l*.¹ Of this, 2,500,000*l*. at least is surplus over expenditure, and no longer required. 1,800,000*l*. more, at least, is spent in collecting the items of Excise and Customs, than would be expended in collecting the proposed increase of the income-tax. We calculate that by the entire remission of all further taxes on articles of consumption, at least 10 per cent., or 2,000,000*l*., would at once be expended on the other sources of revenue; namely, on assessed taxes, stamps, postage, &c., according to the experience and principles already detailed. These savings, deductions, &c., amounting to 6,300,000*l*., would reduce the revenue required to 51,099,000*l*. in round figures, assuming there were no reduction of expenditure or increase of annual wealth, and area of taxation.

Nine per cent. on all incomes above 50*l*. would, together with the other taxes, and a moderate tax on real property inherited, more than supply this amount.

The amount now assessed under schedules A and C, is 116,153,000*l*., to which we add 30,000,000*l*. for Ireland, and 74,000,000*l*. for property under the present minimum of 150*l*., none of which we propose to exempt. This is founded on the returns of income-tax of 1803. This gives an annual produce of 232 millions.

The amount now assessed under schedules B, D, and E, is 75,000,000*l*. There is no doubt that this is less than it ought to be even now, and under the decreased expenditure proposed on other items, it would greatly increase; and Mr. Alison's estimate of 100,000,000*l*. is too low for all such incomes, even

¹ For 1851. The abstract published in the newspapers on the 6th of January, is always defective by several millions, and merely of use as a comparative estimate.

exempting those (not being wages) below 50*l.*, which would yield no very large amount: say therefore 110,000,000*l.* This would give, therefore, an annual taxable income of 405,000,000*l.*

The sources of revenue would therefore be these:—

	£.
Income-tax, at 9 per cent. (1 <i>s.</i> 9½ <i>d.</i> in the pound)	36,450,000
Stamps, as in 1851 ¹	6,176,000
Probate duty on inheritances (new)	1,080,600
Land and assessed taxes, as in 1851	3,796,000
Post-office ¹	3,039,800
Crown lands	352,900
Small branches of hereditary income	25,800
Surplus fees, &c.	108,900
	<hr/>
	£51,030,000

It is easily shown that this proceeds on no exaggerated estimate of incomes. The amount we propose to tax, or rather, that we have assumed to be now taxable on our scheme, is 405,000,000*l.* Mr. Alison computes that wages, which we exempt and he adds, amount to 227,000,000*l.* more. If so, the total income, according to the data that he and we have taken, is 632,000,000*l.* Now, Pebrer estimated the annual produce at 514,823,000*l.* in 1833. And, assuredly, the amount must have increased by much more than the difference during the last twenty years of unexampled prosperity. That our estimate is a low one, is obvious. We would make no alterations in other taxes. They are all, more or less, direct; and the assessed taxes are levied chiefly on the enjoyment of luxuries, or on what Sismondi particularly recommends as a legitimate object of taxation; namely, *vanities*. If this does not, according to sound financial economy, such as we have endeavoured to set forth, much affect the ultimate incidence of the burden, at any rate it very innocently ministers to a popular feeling; and this is by no means unworthy of the consideration of statesmen.

As there were only 16,000*l.* collected in 1851 for the new house-tax, we have not made any alteration respecting its sub-

¹ The newspaper advertisement duties are deducted from the stamps, and an equivalent is added to the post-office. A penny postage on them would amount to this at least, and relieve intelligence of its present tax.

stitution for the window-tax, in the above estimate. Nor is it necessary to extend its area, for the immense increase of every kind of enterprise we contemplate, would raise it to more than an equivalent for the remnant of window-tax included in the above revenue of 1851, amounting to 945,000*l*. There is no fairer tax than a house-tax; and as all lodgers and all consumers are charged by lodging-letters, professional men, and tradesmen, a compensatory per-centage on their rents, fees, and prices, the incidence of it is rapidly distributed over society.

As a war-tax, it is convenient, Sir Charles Wood tells us, to have its increase in reserve as a resource. Perhaps householders, having an especial dread of cannonading, would be the most likely persons to advance fresh taxes for protection in the event of such an emergency. For our parts, it seems quite as easy to increase the income-tax.

We propose a very moderate tax on inheritances of real property. True it is, that here again, the effect of such a tax would be shifted to others: rent, and all the produce of land, would be eventually increased in price, *pro tanto*.

It seems that no account is ever taken of the amount of landed inheritances which pass in a year. It is doubtless considerable, for though longevity is increased, landed property is immense. Mr. Porter calculated it at 2,382,112,425*l*. in Great Britain alone, in 1842; and the annual value assessed to the income-tax in 1843, was 95,284,497*l*.

It is not easy to calculate the produce of such a tax. The whole amount on which the legacy-duty was paid in 1851, was 49,402,000*l*.; of which it is assumed by Mr. Sotheron, that seven-sixteenths was for land, = 21,613,000*l*. Now, assuming that as much as this passes without legacy-duty by succession, a tax of 5 per cent. will give 1,080,000*l*., or a little less than the present amount of tax on legacies.

There is a reason for not taxing it heavily. It would be easily evaded.

Moreover, much land is converted into money for distribution to legatees, and so pays the duties. Again, in purchasing an estate, there is a heavy stamp-duty, the interest on which, calculated for twenty or thirty years, will often equal the

duties paid by personal property at the close of the possessor's life, and which property had originally been invested without the payment of any duty at all. The agriculturists have talked a great deal of the burdens on land; and as in the proper sense of the term, they cannot point out one, while they really are exempted from some burdens which others pay; and this has contributed to lead to a discussion detrimental to their true interests, and to keep out of sight the how and the why certain taxes, though not burdens on the land in the sense of being directly levied on its produce or instruments of production, do, nevertheless, affect the value of land. Who, for instance, would ever think of calling the soap-duty a burden on the land? Yet, repeal that duty: the half of every pound of soap is fat; and an experienced agriculturist has informed us, that he believes the repeal of the soap-duty would increase the value of a fat ox by six or seven shillings. Who would call the paper-duty a burden on the land? Yet, let the act of the paper-manufacturer be once freed from the trammels of the Excise regulations, and who can tell the limits within which straw would become the staple of the manufacture? We have now before us a beautiful specimen of paper manufactured from straw—but where? Why, where it is subject to no excise interference—America. We are here bound to admit, that we have been told the Eastern Counties Railway prints its tables on paper made from straw. In answer, then, to the notion that this proves the thing profitable now, we can only say our informant was a paper manufacturer, who at the same time said, he could not do it. It is the same with the hop-tax and the malt-tax. They act on agriculture by limiting the demand for agricultural produce. In that their burden consists. The evil of the malt-tax is this: an inferior quality of barley cannot be properly malted in the same time and method as a superior quality. But to prevent fraud, the exciseman insists on certain times and processes suitable for the superior, but not for the inferior, compatibly with profit.

X.—GENERAL PRINCIPLES.

Taking the broad view of the matter, why should such a system of direct taxes be more impracticable than it was to levy

a 10 per cent. property-tax during the war, or in the United States, where the Honourable Mr. Selden told the committee that the whole revenue, worth considering, of the State of New York, is raised by taxes on real and personal property.

Why are we to remain not only behind other nations, but behind our own example? It is high time that the petty scale on which reforms of great social and economical systems have been hitherto attempted be renounced, and something worthier of us begun.

We believe that not a single recommendation we have made is more than a legitimate deduction from, and carrying out of, the great truths laid down by Mr. Porter, whose practical knowledge, as well as sound theoretical science, has earned for him a first-rate reputation, and universal deference to his judgment.

"It would," says Mr. Porter, "have been a favourable circumstance for commerce, and consequently for the progress of social improvement, if government had never imposed any duties upon foreign productions, except with the single object of obtaining revenue. Duties of regulation, whatever may have been the motives for their adoption, have always, in their ultimate effects, been productive of more evil than good, a fact which has been kept out of view." * * "In levying duties of regulation, governments legislate for the good, for the benefit of the producers only of the country, leaving out of sight the interests of the consumers—the universal class—all of whom are placed at a disadvantage for the supposed profit of a few among their number."—*Progress of Nations*.

What is to prevent the adoption of the system we suggest? Is it deemed impracticable to raise so large a per-centage on income? We furnish the means by more than equal savings; and it is no harder to pay and collect than rent, which exceeds it.

We have, in deference to the old and one-sided mode in which the estimate is sure to be weighed, assumed that the existing amount of income to be taxed would remain unaugmented. But will our financiers need to be told that when six millions are deducted from the gross amount of the taxes,—that when six times six millions are shifted from the elements of production and the necessities of life,—that when trade and commercial enterprise are thus freed from the fiscal burdens which have hitherto cramped and tethered the very instruments of their

existence,—that the incomes themselves, which are the material of the proposed revenue, will expand immensely, and the percentage requisite for the revenue and expenditure of the country be proportionally lessened? Will not that per-centage yearly diminish with the yearly increase of the prosperity and plenty which form the basis on which it rests? But is this all? Will the expenditure of the country remain unabated? Inasmuch as a large portion of it is appropriated to the maintenance of our army and navy, is it not evident that that which lessens the primary cost of their food and clothing must also lessen the tax required to clothe and feed them?

Is it likely that under a system of trade which frees the commerce of our colonies, and opens our ports to the inpouring of the gorgeous products of our Eastern empire, the luxuries of the tropics, the necessaries of the Canadas, and the mineral wealth and boundless productions of Australasia—is it likely that resources so gigantic by nature, when untrammelled by imposts worthy only of the savages we have superseded, should longer need the four millions of military protection we now extend to their commercial infancy, “cribbed, cabined, and confined” in the cradles of the Custom House? Let the pettiness of human folly give place to the fulness of divine bounty. Set free the natural agencies and elements of wealth, with which Providence has blessed the clime and soil of each portion of our enormous empire; give scope to the commerce, the skill, the courage, the indomitable industry, and the noble energy of our people, and there is little fear that they will hold their own through the length and breadth of our dominions, and wherever our flag flies!

There is yet another reason, to which we cannot too often refer, why the people will be the gainers by this change, and why this *1s. 9½d.* in the pound for income-tax, by removing taxation from all commodities, will save taxes to a much greater amount. It is because, owing to the enormous frauds perpetrated on the revenue and the consumers by the producers and sellers of those commodities, besides plunder at the Custom House,¹

¹ “Facilities exist for committing frauds on the revenue and the merchants, so as almost to defy detection.”—Evidence of Sir Thomas Fremantle before Committee on Customs, 1851. Ques. 5050.

a very large amount of the tax now paid by the consumers for every ounce and nail they purchase, never goes to the revenue at all. The result of this is, that whereas *1s. 9½d.* is all that is required to make up the net amount now got by the state from Excise and Customs, the taxpayer really pays at least *2s. 6d.*, and often *3s.* We maintain, with little fear of contradiction, that our scheme puts the difference into his pocket, and would, ere long, prove a direct and average saving to him of from 35 to 50 per cent.

Let us illustrate this by a single article—soap, which it is a disgrace to past governments to have taxed at all.

“That frauds,” says Mr. Porter, “to a great extent, are committed by the surreptitious production of soap, may be believed from the fact, that there are fifty persons in England who each take out an annual license, the charge for which is *4l.*, and who do not pay duty to the Excise on a greater quantity than one ton in the course of the year, leaving room for suspicion that the license is used as a cover for fraudulent purposes. There are besides a great number of persons who make soap secretly, without taking out a license, and who consequently pay no duty whatever.”

Again he remarks :—

“The Excise regulations so entirely prevent improvement in the processes, that the quality of soap made in foreign countries, where no such regulations are imposed, is invariably superior to that of English soap.”

This is a most important fact in favour of a total abolition of these vile indirect taxes. They not only cripple the extension of our home productions and trade, but they deteriorate the quality of the produce, and check improvements.

Tea is another example of the same effect from our vicious system of taxes, and a very remarkable one; and though a Customs duty, it affects the consumer in the same way, and to a far greater amount. If there be one thing which it is more than another the duty of a government, careful of the morals and health of the people, to cherish and further, it certainly is sobriety: and to put tea within the reach of all classes of the poor, is, perhaps, one of the best modes of effecting this object. To put it as far as possible out of their reach, our vicious fiscal policy imposes a tax of 300 per cent. on the tea consumed by the poor, while it taxes that used by the rich at about 200 per cent. The enormous extent to which such a system of taxation

cripples our home trade, and dwarfs our foreign commerce, is, in our judgment, a mere trifle compared with the disastrous injuries it perpetrates on the morals and health of the people: so let a single instance suffice. Mr. Gardner, a witness of experience and undoubted veracity, examined before the Import Duty Committee in 1847, said:—

“A piece of shirting, the cost of which in Manchester is from about 9s. 6d. to 11s., according to the quality, will purchase twelve pounds of the average quality of tea. The Chinese levy a duty upon that piece of shirting of 7½d.; and we levy upon the tea which we receive in exchange for it, 1l. 6s. 3d.” * * * “Our trade with them is limited only by our returns. As to the capabilities and disposition of the Chinese, I believe if they had the means of paying for them, they would take nearly all the goods that we could manufacture in Lancashire.”

On the adulteration of teas, consequent on the enormous duty, the evidence is overwhelming. Sloe-leaves are extensively used. Spent tea-leaves are bought, dried, dyed, and resold, all over the kingdom. Green tea is habitually manufactured from black, or from other leaves, with Prussian blue, magnesia, and other drugs; some of them containing virulent poisons. It is no exaggeration to assert that more than double the quantity of tea imported is sold in this country every year, and that not one quarter of that which the poorer classes buy is pure *tea at all*. Nevertheless the same enormous duty is paid alike by the consumer on everything that is sold under the name of tea.

It would be a curious calculation what is the real amount taken from the people's pockets to raise the thirty-two millions which alone finds its way into the exchequer. There are no means, of course, of estimating it; but it would by no means surprise us to find that it was half as much again; for it is not only in the adulteration of the article sold, and the reduplication of it, the whole of which is charged *plus* the tax to the consumer, that the extortion consists. That is only part of the cheat. The other is, that if 2s. are charged per pound for tax, at least twenty per cent. more is laid on to the price, especially on the fractional quantities sold to the great bulk of the people

There is no cure for all these villainies but the total abolition of the system which harbours them. In respect to the adulteration of the goods, produced by taxes on them, Mr. Porter says:—"It is known that no surveillance will suffice to prevent illegal mixture where it is to the interest of the manufacturer to make them."

Is not the health, then, of the community concerned equally with its purse in the reform we suggest?

The taxes we propose to leave are open to none of these objections. They are all direct taxes, paid either on incomes or superfluities and conveniences which each payer chooses to have, and for that which cannot be thereby raised in price. Here is a list of the chief taxes we propose to continue to levy:—

1. Income-tax.
2. Assessed taxes; including every luxury and vanity, from hair-powder to carriages.
3. Stamps; including an increase on licenses for sale of spirits and game *certificates*, which ought not to be classed with the Excise; they are trivial.
4. Post-office.¹
5. Crown lands, small branches of hereditary revenue, and surplus fees.

The taxes we repeal are, every tax on every commodity essential to society, from hops to coffee, from tin to tea, from soap to paper, from wood to wine.

In addition to these fiscal advantages, we offer to rid trade of the inquisitorial machinery and espionage of the Excise,—a grievance almost equal to the demoralization which the temptation to smuggling and illicit evasions of taxes occasions.

There is yet another advantage in this scheme, namely, that it affords the easiest possible mode of adjusting the revenue to the expenditure year by year, without the ordinary parade and detail of fresh budgets. As the wealth, and therefore, income, *i. e.* the area of taxation, increases, so will the per-centage of

¹ This will be enormously increased by increase of trade; but we have taken no credit for it in our lavish estimate of the income-tax required. *Idem* as to licenses for sale of spirits, which we believe will not be considerable.

tax decrease. The increase of population will be a certain cause of these annual decreases of taxation, from 9 to 8, to 7, and 6 per cent. We have every ground to hope that 7 per cent. will amply suffice ere long.

The increase of our export trade, averaging seventy millions a year (declared value), has during the last two years of unparalleled prosperity and fertility, been a paltry 8 per cent. (population having accounted for nearly 3 per cent.), about which some people have been making as much cackling, as if it were not a disgrace to us to have profited so little by natural opportunities so bountiful and unprecedented.¹

If our scheme is adopted, trade, and every source of wealth, and what is of infinitely greater value, every moral element in the welfare of the people, will be doubled in five years. It is a plan well worthy of a great country, and alone commensurate with the aroused interest, awakened intelligence, and excited expectation of the people. It may be that this, and perchance another Cabinet, may wreck itself on the shoals of that peddling, pitiful system of small changes, which has rendered our finance a curse, and our budgets absurdities. But this practice of short-comings,—this lingering love for obsolete dogmas and costly customs, must sooner or later give place to the behests of a wiser age, and the requirements of a growing commerce.

We ask for a system of national revenue that shall cease to vex trade, cripple industry, and fetter the instruments of wealth,—a system which shall take no more taxes from the people than the revenue requires, and whilst it secures the legitimate expenditure of the State, neither cramps the energy nor injures the health of the people.

The country is sick of petty changes; and of professions of great principles followed by little doings. If our ministry is to be a government, it must renounce the tactics of its predecessors, and adapt our fiscal policy to the permanent interests of the empire.

¹ Such as unrivalled harvests, partial free trade, the Exhibition, new railways, &c. &c.

P.S.—Since the above was in type, a long lecture has been given by Mr. Farr (for whom we have a high respect), at the Statistical Society, to show the grounds on which an equal rate of income-tax on all incomes is unjust: and he elaborates his proofs that the same amount of annual income, say 1,000*l.*, has a widely-different saleable value, according to its nature and investment; in other words, that the capitalized values would differ greatly. No one doubts it. But mark his conclusion:—“If,” he says, “you admit that one is more than three times as valuable for sale as the other, you cannot contend for a moment that it is equal to the other in levying a tax on their owners.” But we do contend that it is perfectly equal; inasmuch as it is only on the *annual* income that the *annual* tax falls; as thus:—A. has a life income of 1,000*l.* in the Long Annuities, saleable at 6,000*l.*, and enjoys it five years. B. has a permanent property in the Consols, value 33,000*l.*, producing also 1,000*l.* per annum, which he enjoys fifty years. Put 10 per cent. tax per annum on each. During his possession, A. will receive 5,000*l.*, and pay 500*l.*; B. will receive 50,000*l.*, and pay 5,000*l.*;—where is the inequality or the injustice? Oh, but suppose they want to sell their respective interests? Suppose they do. Neither pays any more tax after the sale; so far, there is no inequality. Neither are the amounts received from the sales a bit more affected by the tax; for it is a yearly deduction levied on the yearly possession, and exactly proportioned in each case to its continuance. And the buyers so buy it. The price is proportioned to the duration of the property, and so is the tax.

Mr. Neison puts the same mistake as Mr. Farr's in a still more palpable shape:—

“Mr. Neison said he would take two classes of persons, both of whom required a capital of 10,000*l.*, that would be carried on for a series of years, and would be perpetuated by them and their successors. The one said, ‘I shall employ my capital in investments which shall determine in ten years, and which shall produce a return of 1,000*l.* a year.’ The other invests his capital in a perpetual investment, at thirty years’ purchase, which shall return him an income of 300*l.* a year. Now, the duty of the first is to make his property yield him 1,000*l.* a year, to have his 10,000*l.* intact, or as nearly intact as may be, at the end of the ten years, ready to embark in some new investment. The duty of the other is simply to collect

his rents as these fall due. Assuming, then, that the tax is assessed at the rate of 3 per cent., the tax upon the first will be 30*l.* a year, while the tax upon the other is only 9*l.* a year. It consequently follows that while it is the duty of both to preserve their capital of 10,000*l.* intact, the one is liable to a perpetual tax of 30*l.* a year, the other to a perpetual tax of 9*l.* a year. Now, he would like to see how, by any classification, or by levying a tax in any other manner than upon their capital, they could get rid of this inequality. He did not see how by any other manner they could prevent the one class paying 30*l.* a year, and the other paying 9*l.*"

We trust it never will be prevented. It is precisely what is required by the strictest justice; and what is here termed an inequality, is the just proportion between the incomes actually enjoyed. It seems to have escaped Mr. Neison's shrewd mind, that the capital placed in "a perpetual investment," bringing 300*l.* to the possessor named, who pays 9*l.* tax, is really bringing 700*l.* a year to somebody else not named, who uses it for him, and who is paying 21*l.* for it. A perpetual investment is not a dormant capital, but a circulating one. And whether or not, he who receives most income, is taxed most; he who receives less income, is taxed less in the same proportion. And this, we repeat, in the words of Colonel Thompson, is the fair thing. And so the country thinks. We do not for a moment believe that the actuaries have the slightest eye to their own interest, in proposing schemes which would require yearly readjustment effected by intricate calculations—a charge to which their proneness for arithmetical mystifications, and making finance a mere "science of statistics," has unjustly exposed them. It is their *métier*; and they love it indiscreetly. But we may, without any imputation on them, say with the father of the sick girl in the French play, to the neighbour who recommended a new necklace as a cure: *Monsieur, vous êtes bijoutier !*

ART. II.—THE LAW OF MARINE INSURANCES.

[*Second article.*]

TOTAL loss may be of two kinds—absolute and constructive. In the first, the insured interest is actually destroyed; in the second, the insured has a right, under certain conditions, to consider it so. In order to render a loss of the latter kind total, the insured must abandon in a reasonable time after the intelligence received; where the loss is complete, abandonment is unnecessary. The whole doctrine of abandonment turns upon the principle of making insurance a contract of indemnity, and nothing more; as has been said, it is only in cases of constructive loss that abandonment is necessary. What has ceased to be, cannot be abandoned. The underwriter engages that the object of the insurance shall arrive in safety at the port of its destination. If during the progress of the voyage it be annihilated, or placed, in consequence of the perils insured against, in such a situation that it is wholly beyond the power of the parties interested to procure its arrival; if, supposing it a ship, it be reduced to a mere assemblage of planks; or, supposing it hides, it becomes a fermenting mass of putrefaction; in such case the very letter of his contract obliges the underwriter to indemnify the insured by the payment of the entire value of the property. Supposing, however, an intermediate case, supposing a forcible detention so long as to frustrate the purposes of the voyage, supposing the goods so damaged as not to be worth conveyance to the port of delivery, the vessel unnavigable, and its reparation impossible; or in the possession of an enemy, from which it is released by an event not at the time when he abandons within the knowledge of the insured. In all these cases he is entitled to treat the loss as a total one; in other words, to abandon; and demand the full amount of his insurance. The law of abandonment is admirably expounded by Lord Abinger, in the case of *Roux v. Salvador*, from which the following, and much of the preceding, is extracted.

The history of our own law furnishes few, if any, illustrations of the subject of abandonment before the time of Lord Mansfield. That great judge was obliged to resort to the aid of foreign codes, and to the opinions of foreign jurists, for the rules and principles which he laid down in the leading cases of *Goss v. Withers*, and *Hamilton v. Mendez*. But even those principles are, comparatively speaking, of modern date. The most ancient codes of the law maritime, when it was considered as part of the law of nations, contain no chapter upon insurances, neither do the earliest municipal codes, nor the earliest treatises upon insurances, make any mention of abandonment. When a policy of insurance was considered in the nature of a wager, without reference to any actual interest possessed by the insured, it was needless to treat of abandonment. The code of Florence, which bears date 1523, contains no allusion to that topic. The decisions of the Rota of Genoa, at the time when that state was most eminent for its naval power and commercial enterprise, have been preserved by Straccha. Amongst them are found many cases of insurance upon sea risks; not one of them turns upon any question of abandonment, or contains any allusion to that subject. The same author has written a very elaborate treatise upon insurances, but is equally silent on the subject of abandonment. He has also preserved in that treatise the form of a policy, bearing date at Ancona, October 20, 1567, which he says was at that time in general use amongst the states of Italy. From the terms of that policy, it is difficult to infer any right or duty of abandonment. It contains this clause: "Et si delle mercantie assicurate intervenisse o fosse intervenuto alcun disastro li assicuratorii debbono dare et pagare quelli danari assecurati al detto assicurato fra mesi due dal di che in Ancona ne fosse vera nuova. Et si pretendessero per ragione alcuna dire in contrario, non possono esser uditi da corte, giudice, o magistrato alcuno, si prima non averanno pagati effectualmente danari contanti." So that, not only two months after the credible news of any disaster, was the underwriter bound to pay a total loss; but if he meant to contest the claim, he was within that time to purchase the right of litigation by first paying the sum insured. It was, however, to be restored to him in the event of

his success. There is also a clause in the policy, by which, if there was no account of the ship for twelve months, the underwriter was bound to pay at the end of that time, subject to restitution if the ship should afterwards arrive, a provision wholly inconsistent with any notion of abandonment. The same law probably prevailed at that period throughout the states of Italy. But when insurances came to be considered as contracts of indemnity, and not as mere wages, it became necessary to make some rules for the conduct of the parties where the loss was partial, as well as to secure to the insured, when it was total, the full measure of his indemnity, and no more. The obligation of abandonment was the necessary consequence of confining the object of the contract to a strict indemnity. Accordingly we find in the chapter of insurances, in the Civil Statutes of Genoa, in 1610, the disaster upon which the underwriter is bound to pay, is limited and defined to be the incapacity of the ship to proceed within a month after she has been disabled, or the detention of her by force, and the compulsory dereliction of her voyage, whereby she is forced to land the goods insured.

In those cases the insured may either abandon the goods, and demand the full insurance, or make up the amount of the loss, and demand it from the underwriters, who, if it amount to 50 per cent., shall have their option either to pay that sum and leave the goods to the insured, or to pay the whole and take the goods. By the same law wager-policies are prohibited, and declared void.

Here, it is obvious, that the object of the law was to limit the claim of the insured to a strict indemnity. The same principle will be found in the various codes of the other maritime states of Europe in which abandonment is mentioned; though it must be admitted, that the rules they have respectively adopted, are very different. In some, abandonment is merely permissive, and limited to very few cases. In others, as in the codes of Rotterdam and Amsterdam, abandonment was imperative even in the case of an absolute total loss. Such seems to have been the law of France as established by the ordinances of Louis XIV. in 1681. From the words of that code, indeed, it might be

thought that they were only intended to prohibit it in all but the specified cases, and not to enforce it as a preliminary condition for recovering an absolute total loss: "Ne pourra le délaissement être fait qu'en cas de prise, naufrage, bris, échouement, arrêt de prince, ou perte entière des effets assurés, et tous autres dommages ne seront réputés qu'avariés." Emerigon, in his treatise "*Des Assurances*," c. 17, s. 1, remarks, that "abandonment presents to the mind the idea of a thing existing in whole, or in part, or at least the idea of a doubtful existence; for it appears absurd to renounce to the insurers a thing of which the absolute loss is already established. Nevertheless," he says, "according to our maritime laws, one may abandon to the underwriters a thing entirely lost; and however singular it may appear, the law requires the form of an abandonment in the process of an action *de délaissement*, though it be stated that the goods have absolutely ceased to exist." This apparent inconsistency in the law of France is now removed by the Code Napoléon. Under the title, "*Du Délaissement*," in the Code de Commerce, there are seven cases enumerated in which abandonment is permitted; amongst which, the "*perte entière des effets assurés*" is not to be found. There is, indeed, a power given to abandon in case the loss or damage of the goods insured amounts to three-fourths; but the necessity of making an abandonment in case of the entire loss, seems to be guarded against, especially by article 372, which provides, "that the abandonment shall extend to nothing but those effects which are the object of the insurance and of the risk."

But whatever lights might have been heretofore derived from foreign codes and jurists, the practice of insurance in England has been so extensive, and the questions arising upon every branch of it have been so thoroughly considered and settled, that we need not now look beyond the authorities of the English law, to illustrate the principle on which the doctrine of abandonment rests, and the consequences which result from it. It is, indeed, satisfactory to know, that however the laws of foreign states upon this subject may vary from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing

more. Upon that principle is founded the whole doctrine of abandonment in our law. The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the insurer or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases; there may be a capture, which, though *primâ facie* a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship un navigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these, or any similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it, still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures at his own cost for realizing or increasing that value. In all these cases not only the thing assured, or part of it, is supposed to exist *in specie*; but there is a possibility, however remote, of its arriving at its destination, or at least, of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he

is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract, because the insured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain, which was uncertain before.

We now come to the word *Baratry*:¹ this includes every species of fraud in the relation of the master to his owners, by which the subject-matter of the insurance can be endangered. This word, the origin of which has been much discussed, is clearly derived from the Latin "*varius*,"² or, if we go further, from the Greek βαλιδος, and was first employed in its present sense by the merchants of Barcelona. Its primary signification in modern times was that of changing one thing for another in lieu of money; hence our word *barter*. Much surprise has been expressed by English judges at this clause in the policy, but it appears as ancient, if not as universal, as any stipulation it contains. "En France et en Portugal la baraterie passe pour cas fortuit, l'assureur y est venu, et en est responsable."³ The principle may be traced to the Roman law, according to which the master of a vessel was not, in certain cases, responsible to its freighter for the conduct of the slave (*institor*) to whom the management of the vessel had been intrusted; for instance, when excessive and unusual confidence had been reposed in him. It therefore became necessary for the merchant to take precautions against the misconduct or infidelity of the agent whom he was compelled to trust. In Italy and Spain the insurers were not *ipso jure* responsible for the *baratry* of the captain, and, therefore, says the writer of the valuable treatise above cited,

¹ Emerigon, 12, 3; Code de Commerce, 353.

² Βαλιατ τελευτικες, Alcestis, 579; Persius, 4, 11,—"*Fallit pede regula varo.*" *Stellionatus* (Dig. 47, 20) is derived from *Stellio*, and employed by the same metaphor to denote fraud in the Roman law,—"*Stellionatus crimen objici posse his qui dolo quærunr,*" &c. Sancho's island of *Baratona* will occur to every one; and it is in the same sense that the word is used in the case of Montesicor's "*Pociencia y Baratur.*"

³ Guidon de la Mer, ch. v. art. 6, 9; Ordonnance, 1, 8, tit. "Des Assur." art. 28.

“ Le plus assuré pour éviter ce procès sera d’insérer en la police avec les autres risques de la mer, ‘ Baraterie de Patron.’ ” Any act, however apparently insignificant, which discovers a fraudulent design on the part of the master of the ship or the mariners, by which the freighter or owner may be injured, will be baratry ; for however there must be and has, to that fraud the owner must not be consenting, so if it is encouraged by gross negligence on his part, the underwriters will be discharged. Baratry can only be committed against the owner ; therefore where the master of the ship is owner or mortgagor, baratry cannot occur, as no man can complain of an act to which he is himself a party. An owner may render himself liable by fraudulent conduct to the proprietor of the goods, but not as for baratry ;¹ the acts of the captain in his character as consignee must be distinguished from those which he performs in his office of captain, and it is in the latter relation alone that he can commit baratry ; as Emerigon judiciously observes, “ Malgré la dite clause, les assureurs ne sont pas tenus des fautes que le capitaine commet en sa qualité de facteur. ”—E. 12, s. 3. But where a ship is let as a house, and is under the direction of the freighter, the freighter will be considered the owner, and the assent of the general owner to the baratry of the captain will not in that case discharge the underwriters ; on the other hand, where the entire ship is let for a voyage, the acts of the charterer are the acts of the general owner, and the latter cannot recover against the insurer for baratry in which the former has participated. Baratry may be committed at land as well as by sea, and by other persons as well as the master and mariners. To evade duties in a foreign port, smuggling without the knowledge of the owners, fraudulent delay, collusion with the enemy, disobedience to instructions when the act done is injurious to the owners, sailing to the port of an enemy, resistance to search when lawfully demanded, gross malversation by the captain in his office, misconduct of the crew, cruising without authority from the owners,—all these are acts for the evil consequences of which to the ship and goods the insurer may recover in the name of baratry.

¹ So Roccus, 4, 4 ; Emerigon, 12, 3 ; Code de Commerce, 351.

The underwriter acting within the pale of these principles, which have been already cited, is at liberty to undertake any risk that he thinks proper. He may limit or modify as he pleases the responsibility he chooses to incur, and the risk may comprise the home or outward voyage, or it may be for any part of such voyage, from one port to another during its course, or for a stipulated time during its continuance. The beginning and end of the adventure are determined by the policy alone. No risk can begin until the interest of the assured is vested. Before the commencement of the risk the ship must be safe, that is, in a state of physical safety, against the perils insured against. The vessel must be in such a condition as to enable her to be in proper security till she is prepared and equipped for the voyage. There must be a time before the voyage commences when the ship is seaworthy, and if this condition is complied with, the policy will be valid although at the time of the commencement of the risk the ship was not seaworthy. She must have been in good safety at some time, either coinciding with the commencement of the risk, or between the commencement of the risk and the happening of the damage, which the underwriter is called upon to make good. If she arrive at a foreign port a mere wreck, the policy on the homeward voyage never attaches. It was held in a case before Lord Hardwicke, and the decision has been acted upon by Mr. Chancellor Kent, that where the terms "at and from" are used, the risk commences immediately on the arrival of the vessel at the port. But it has been held in the English Court of Common Pleas, that the risk commences after the vessel has been moored in port twenty-four hours. Lord Ellenborough thought it sufficient, whether the loss happened within the twenty-four hours or not, but the vessel should have been once in safety at the port.

Policies on goods, where the words "at and from" are used, attach upon the goods put on board the vessel. In France, they attach when the goods are put in boats, unless the goods ascend or descend a river to the ship. The risk ceases when the cargo leaves the ship, unless from some temporary cause the goods are landed; in that case they still remain under the protection of the policy; if the words "safely landed" are, as is

usual, contained in the policy, the risk is prolonged until that event happens. Where, in the usual course of trade, the goods are removed to the shore in public lighters, they will be protected by the policy during their passage; but if the owner take them under his own care, and employ his own lighters, the underwriter will be discharged. The policy attaches on goods taken in exchange, or substituted, in the course of a landing voyage, as often as the goods may be changed. Where a policy is made "at and from," doubts have sometimes arisen as to the place comprehended by the word "at." It was held in the Court of Common Pleas, in the construction of a policy, when the words which were used were "at and from" Jamaica to London, that a ship moving from one port to another in the same island was protected. The words "port, or ports of discharge and loading in India and the East-India islands," have been held to comprise the Mauritius, though geographers designate it as "an African island." An insurance on goods "at and from Singapore, Thaluca, and Batavia, to a port of discharge in Europe, with leave to touch, stay, and trade at any ports or places whatsoever and wheresoever in the East Indies," has been held to attach to goods loaded at Sanabaya, 400 miles to the eastward of Batavia—Sanabaya not being in the track of any of the places mentioned in the policy, and the vessel having returned to Batavia from Sanabaya to complete her cargo, Mr. Justice Story observes, "that the construction of the word 'at' must depend, in some measure, upon the state of things, and the situation of the parties at the time of underwriting the policy." It was also observed by Lord Ellenborough, in a question as to whether a policy had been abandoned, from the length of time which had elapsed between the signature of the policy and the sailing, "that whether or not there was an abandonment of the original adventure was to be decided from a fair review of all existing circumstances at the time when the voyage might be supposed to commence." And in another case, where the words "at and from Pernambuco" were used, and the question was, whether the policy had attached, Chief Justice Gibbs took the fact of the vessel having come to Pernambuco, and having endeavoured to procure a cargo, into his consideration.

Where the words "at and from Genoa, from the loading to equip for the voyage" were used in the policy, it was decided that the policy did not protect goods that had been put on board at Leghorn. It has been held that "at and from" a place attaches from the time of the ship's readiness to begin to receive her cargo. Where the word "from" alone is used, the risk begins when the vessel weighs anchor, completely prepared for the voyage. The risk in freight begins, in the absence of any contrary stipulation, from the time when an insurable interest in it accrues to the insurer. Where, however, the risk begins after such interest has vested, the same principles apply, by which the commencement of a risk in the case of a ship or goods are determined in an open policy, the recovery is limited to the actual amount of freight which would have been earned; and proof that freight would have been earned is necessary in a valued policy; if an inchoate right to freight has existed, the insured is entitled to recover, though part only of the cargo has been put on board.

Risk, in some shape or other, is the essence of insurance.¹ The contract is, what the civilians term aleatory; where there is no risk, therefore, where the die is not flung, where the hazard is not incurred, the contract does not exist, and the money that has been advanced as a consideration for an indemnity against dangers which could never have taken place, must be restored; in other words, where there is no risk, there must be a return of premium.² There can, of course, be no risk where there is no insurable interest; but where the ship and freight were insured, the voyage had been performed, and the ship had arrived in safety, it was held too late for the assured to rip up the matter, and say they had no insurable interest, on the ground that their title to the ship was defective. The same principle which entitles the insured to a return of the whole premium where no risk has been incurred, entitles him to a return of part of the premium where only part of the insured property has been in jeopardy. On the other hand the law is

¹ Code de Commerce, 349.

² "Hujus commercii bonum et damnum dependet a merâ sorte et futurâ."—Roccus, 6.

clear, if the risk be commenced, there can be no return of premium. On this principle it is held in England, though a different rule prevails in France, that where a ship is insured for twelve months, and the risk does not extend beyond two, the assured is not entitled to any return of premium.¹ Where, however, a ship was insured from London to Halifax, warranted to depart with convoy from Portsmouth, and being too late for convoy at Portsmouth, did not sail at all for that port, Lord Mansfield held, that the contract was divisible, and that so much of the premium as had been given for the indemnity from Portsmouth to Halifax, had been paid without consideration, and ought to be returned.² In a subsequent case the same great judge observed, that where there was a contingency in the voyage, the risk might be divided; and that the reason why there were not two policies in such a case, is, that the risk "at" is capable of an exact computation. He therefore held, "these questions were those of distinct risks insured by the same policy." Whether the policy is to bear this interpretation must depend upon the intention of the parties, the nature of the contract, and its consequences. In two other cases the risk was held indivisible.³ Besides the causes which have been stated, as entitling the assured to demand a return of premium, it sometimes happens that he may obtain it on the ground of *positive* compact,—policies often contain a stipulation for a return of premium on certain events. The principle of indemnity appears to be lost sight of in some measure by such an agreement, but it is enforced by the English law. It was held, in a case where goods were insured at a premium of eight guineas per cent., to return four if the ship sailed with convoy and arrived; and where the ship did sail with convoy, and arrive, but was captured at her port of destination before the

¹ Quemadmodum, sic non existentis nec valet emptio, et stipulatio non subsistit rerum quæ non existant, neque legatum valet quod in rerum naturâ non reperitur, ita quoque asseveratio si in navi non habeantur merces nullius momenti est."—Marquantus, 2, 13, 23.

"Si non adest *risinum*, asseveratio non valet."—Roccus, 55.

"Le contrat s'évanouit si avant le commencement du risque le voyage est rompu même par le fait de l'assuré."—Emerigon, 1, 3.

² Ban. 1237; Stevenson v. Snow.

³ Douglas, 761.

property insured was unloaded, that the insured was entitled to recover four guineas of the premium, and a total loss. Where the voyage has been performed, and the insurance is illegal, the premium cannot be recovered: "In pari delicto potior est conditio possidentis." But where the voyage is performed, there is a "*locus pœnitentiæ*," the contract may be rescinded, and a return of premium insisted upon.

In considering the question of deviation, it must be assumed that the voyage insured has begun, and that the ship has left her track in the voyage. There cannot be a deviation from what never existed; and therefore, if the vessel being insured for one voyage sail upon another, the policy will not apply. Deviations from the usual voyage arise from after-thoughts, from interest, from policy; in all such cases, the *terminus à quo* and the *terminus ad quem* must have been the same; where, however, there is a preponderating, but not immutable intention to pursue the insured voyage, it will be considered a voyage to the place originally intended, even though, had a certain state of things occurred, there would have been a deviation. There may be a sufficient commencement of the voyage under a fluctuating purpose.—Pardessus D. C. iii. 455. "Ce n'est pas un projet non exécuté, mais le fait qu'il faut considérer." Where, says Mr. Justice Bayley, "the insurance is on a voyage to a given place, and the captain, when he sails, does not intend to go to that place at all, he never sails on the voyage insured. But where the ultimate *termini* of the intended voyage are the same as those described in the policy, although an immediate voyage be contemplated, the voyage is to be considered the same until the vessel arrives at the dividing point between the two voyages. The departure from the course of the voyage insured then becomes a deviation; but before the arrival at the dividing point, there is no more than an intention to deviate." The voyage is designated by its limits (*ab extremis destinatis ad determinandum ejusdem initium, ut finem qualificatur*).—Casarejes, 67, 31. In the Ordonnance of Louis XIV., as well as in the Code, 350, 351, 364, the "route" is distinguished from the "voyage;"—"Independenter se habet assecuratio a viaggio navis."—67, 31, Car. Where the policy is made with reference

to time, the extreme periods of the time constitute the boundaries of the voyage.¹

The necessity of a strict adherence to the voyage insured is a prominent feature in the maritime codes of all nations where this subject has found a place. In the absence of any express provision on the subject, the captain is bound to pursue his course *rectâ navigatione* without any delay that necessity or the fear of danger does not enforce. Any permission to violate this rule must be employed with the most rigorous accuracy, any voluntary delay or change of voyage not permitted, amounts to a deviation; the contract is not superseded, but at an end; and the return of the vessel to her course will not renew the obligation of the underwriters. The true objection to a deviation is not an increase of risk; if that were so, taking an extra cask of gunpowder might produce, and an additional premium might atone for it. It is that the party contracting has changed the contract, and substituted another voyage for that originally purposed. The insurer undertakes to be responsible *pro illo itinere convento et non pro alio*,—for that and no other voyage; if the vessel change her course, or turn aside from her proper track, he is no longer liable; as was decided Rot. Gen. Assur. 40, Q. and Dec. 63. The proposition, however, is thus to be limited, unless the ship shall have turned aside from some just and necessary cause; for instance, for the sake of repairs, or to avoid a tempest, or falling into an enemy's hands; since in all these cases the voyage is altered, and the underwriter is nevertheless responsible: in any of these cases, however, the vessel must accomplish her voyage with all possible despatch. The underwriters are also bound to indemnify the insured against the consequence of a fair exercise of discretion on the part of the master. Where goods are described as actually on board some particular vessel, if the risk be changed by unnecessarily transferring them to another, it is a deviation; but if this become necessary, *ex putâ causâ*, from the condition of the vessel on which the goods are originally placed, not only may the master justify such transshipment of the goods, but it is his duty to procure another vessel for that purpose. A vessel insured to

¹ Emerigon, 13; Roccus, 52.

different ports, may omit some of them; but if it visit any, it must do so in the order described in the policy. If the discretion of the captain as to the choice of his course is shackled by positive orders not communicated to the underwriter, the latter will be discharged. Liberty to touch at any ports for all purposes, will be restrained to mean those connected with the voyage, unless the other provisions of the policy, or the very nature of the voyage, justify a wider interpretation of the clause. Unnecessary delay to land goods when the policy is on goods until landed (unnecessary delay in sailing after the risk has begun), are deviations. If the master of a vessel obey, without opposition or remonstrance, the order of a captain of a man-of-war to examine a strange sail, this will be a deviation; if the risk be varied, whether it is greater or not, it will constitute a deviation. Leave to chase, capture, or man prizes will not give the right to convoy them, nor will a letter of marque justify the chase of an enemy as a mere act of aggression. Liberty to cruise during a continued period does not justify cruising at intervals of time; and permission to see prizes into port is not the same thing as to remain in port during the time that they are repaired. Delay for the purpose of assisting other vessels in distress is not a deviation.

Adjustment is the settlement of the sum which, after all proper deductions are made, the assured under the policy is entitled to receive, and which the underwriter is liable to pay. An adjustment is not conclusive evidence against the underwriter, though it is *prima facie* evidence of his liability. It may be either absolute or conditional; until actual payment of the money, the underwriter may avail himself of any defence which the law or facts may enable him to set up.

ART. III.—LORD ST. LEONARDS : HIS PROFESSIONAL AND PARLIAMENTARY CAREER.

DR. SAMUEL JOHNSON, at the commencement of one of his most delightful biographical sketches, remarked, that Dr. Sprat had given the character, not the life, of Cowley ; and, without admitting that an accurate delineation of mental qualities is less difficult or less instructive than a bare recital of historical details, we can scarcely venture to anticipate success while we endeavour, within the compass of the comparatively few following pages, to bring before the mind of the reader the more salient points in the professional character and public conduct of the eminent individual who was recently Lord Chancellor of England ; in the triumph of whose great abilities and unwearied industry, as it reflects the highest credit on himself, we find another testimony to the value of the free institutions of our country, through which the well-directed and self-sustained energies of superior intellect may steadily advance to distinguished social position and rich reward. Nor can a glance, however rapid, at the path which he has through life pursued fail to afford to the younger members of the profession a lesson of practical wisdom—at once, counsel and encouragement. To the student of English law the gradual progress of the subject of this notice from obscurity to distinction is peculiarly interesting and useful, inasmuch as he, without making any pretensions to the oratorical powers which may have graced some of his more brilliant competitors and without enjoying those advantages of high birth or influential political connections which, if they do not create, at least facilitate success, by keeping his eye fixed upon one object towards which he perseveringly advanced, has, at last, attained the summit of his ambition. That object was, that he should become a thoroughly scientific lawyer : for good or for evil, that seems to have been the earliest and most enduring aim of his existence. The simple fact of his having, amidst so many difficulties, entered upon so arduous an enterprise, shows that the impulse within him must have been

indeed strong ; nay, he probably was, even in early life, conscious of the perfect adaptation of his mental frame to the continuous struggle in which he was about to engage. Once, however, thrown, it matters not whether by chance or choice, or, which is more probable, by a combination of the two originating in strictly prudential motives—the safest of all human guides—into the field of his exertions, he knew well that *nullum numen abest, si sit prudentia* : he, therefore, buckled on his armour and rested not from the conflict until the victory had been by his own arm won.

Edward Burtenshaw Sugden, the second son of Mr. Richard Sugden, who successfully carried on business in Duke-street, St. James's, and moved in a respectable though comparatively humble sphere of life,¹ was born in London about the year 1770. He was educated at a private school ; and, endowed as he was with great perspicacity of mind, habits of industry, fixedness of attention and indomitable perseverance, there can be no doubt that he turned his opportunities of improvement, scanty though these were, to advantage, while, at the same time, he escaped the expense and some noxious influences inseparable from the more public and fashionable educational establishments ; although he probably might, under more favourable circumstances, have gladly availed himself of a wider field of emulation, in which he could not, with his habits and tastes, have failed to take high academic rank. Having decided upon pursuing the study of law—the system of real property being of all others the subject to which such a mind could be successfully applied—and it being necessary that he should, in the first instance, at least, limit his views to one branch of it, he had the wisdom or the good fortune to select that department for

¹ Lord Tenterden was another eminent example of triumph over an adverse condition in early life, although, it has been said, he was throughout his career absurdly sensitive on the point. Not so Lord St. Leonards, who has always taken a more just and manly view of the matter and has gloried in his triumph over external circumstances, amidst even the coarse ribaldry of an election rabble. While addressing the electors at Cambridge, in his unsuccessful contest against Mr. Spring Rice, he met with an unmannerly interruption ; but the frank and sharp retort of Mr. Sugden fell with fatal effect upon his assailant and was received with loud applause by the right-hearted Englishmen around him.

the speedy and effectual mastering of which, in its most recon-dite principles, as well as its merely formal details, subsequent events proved that his naturally vigorous faculties and pains-taking habits of mind were, in a remarkable manner, adapted. Accordingly, Mr. Sugden, in the year 1795, entered the office of Mr. Groom, who was at that time in practice as a conveyancer, and of whom little is now known, except in so far as his name has been thus associated with a pupil who was destined ere long to reflect the highest credit on his first professional instructor. Standing now, as it were, on the threshold of the temple of justice, he, however vague may have hitherto been his views, or desultory his habits, forthwith sedulously applied himself to examine its most secret recesses. He was not, as too many are, satisfied with exhausting a few hours of each successive day in transcribing sheet after sheet from precedent books, under the foolish impression that, useful though the task might be as means to an end, as furnishing him with the instruments which he was afterwards to employ, he was thereby acquiring substantial legal knowledge, or qualifying himself for the enlightened discharge of a high and liberal calling: his acute, inquiring mind, penetrated through the forms to the essence of the transactions of actual daily life; and that he could not possibly have been, at any period, an unintelligent careless student, every page which he has written abundantly proves. Although the hours of a conveyancer in full practice are so incessantly occupied with the nice and extremely delicate task of drawing and settling deeds of various descriptions that he can seldom find either leisure or pecuniary inducement to appear in court as a barrister in the conduct of a cause, still it has always been necessary that his name should be entered on the books of one or other of the inns of court. Mr. Sugden, therefore, having been entered with the society of Lincoln's Inn, kept the usual terms, and was, in the year 1807, duly called to the Bar. His reputation for sound, scientific legal attainments, the result of energetic, unremitted labour during the period of his practice below the Bar, had preceded him: and those who could well appreciate his uncommon aptness for the faithful and able discharge of the functions which

he was about to undertake, predicted, before his name was generally known, the certain success and great distinction which awaited him.

His first professional *brochure*¹ must have been published about the beginning of the present century and ultimately reached a third edition. His thoughts were thrown into the form of "Letters," a channel of communication which he has occasionally through life preferred to that of the treatise or the essay, probably because on topics which might be discussed within a narrow compass and which were of an essentially practical character he could thus offer his suggestions without affectation or apparent presumption: the very names, indeed, of the parties to whom some of these communications are addressed, were such as to attract attention and secure, at least, an impartial and respectful reception of any views which might thus reach the profession or the public. The object which the author contemplated in the execution of this little work was simply to point out the precautions to which a man of property must attend in selling, buying, mortgaging, leasing, settling and devising estates; and those only who are familiar with the difficulties to be encountered and the intricacies to be unravelled in the actual development of any one of these processes are qualified fully to appreciate the perspicacity of mind and clear perception of the application of theory to practice which are almost unconsciously displayed by the author. There is no vain parade of learning: the reader is not left bewildered in a forest of notes or references to authorities and cases concerning the respective merits of which few could decide, inasmuch as they are scattered over bulky volumes inaccessible to the very class of persons whose instruction he had specially in view. He intentionally avoids subtle discussion on abstruse points of law; and appears to have been more anxious to conduct one into the straight path which might be safely followed than to point out the by-ways in which one might, though suspected and exposed to danger, lurk; to inculcate, in short, the practical rules which were to be observed, not to drop

¹ "Series of Letters to a Man of Property, on the selling, purchasing, mortgaging, leasing, and devising of Estates."

hints as to the modes in which these might be slyly evaded or unscrupulously infringed. The style is direct and lucid : technical phraseology is thrown aside ; so that an attentive reader is not less delighted than astonished to find that doctrines of law are neither more nor less than the dictates of common sense. These " Letters," composed as they were *currente calamo*, display an extraordinary grasp of mind as well as facility of statement.

The great work,¹ however, illustrative of the branch of jurisprudence which had been thus cursorily touched, though by the hand of a master, appeared in the year 1805 ; and Mr. Sugden at once attained to the reputation of being one of the most accomplished and skilful conveyancers in the profession. It would be superfluous labour, nay, trifling with the intelligence of our readers, if we were to dwell in detail upon the merits of a work which comprises, beyond, perhaps, any other book on English law, a wonderful amount of accurate and useful equity principles, which are constantly affecting the transactions of life and which, in consequence of the momentous results to individuals and families dependent upon their practical application, are incessantly the subjects of animated and interesting forensic discussion. Throughout the greater portion of this admirable work the author trod upon virgin soil ; and at no stage of his inquiry could he possibly have received any material hints with respect either to the substance or the arrangement of his thoughts. His plan was strictly original, the various authorities having been rigidly examined, and each case falling into that compartment of the subject to which it appeared, according to the design sketched in the mind of the author, specially to belong. The style, too, is clear though concise ; and along with all the principles may be found collected in the work everything which can be considered practically useful within the range of so extensive a field of investigation. Various editions of this masterpiece of legal learning have been, as might be supposed, successively issued from the press ; and, accordingly, the cases decided during the respective intervals have been, from time to time, incorporated with the original illustrations.

¹ " A Practical Treatise on the Law of Vendors and Purchasers of Estates."

In the ninth edition,¹ for instance, even the language of the text was so qualified and altered as to meet the exigencies of the Real Property Acts, which had been recently passed; and in the chapter upon "Title" a succinct view of these Acts is introduced. Still the work continued to command the approbation of the public and the supervision of its author; and, in the year 1839, there appeared a tenth edition bearing the impress of much labour. The alterations and additions were extensive and judicious—the results of the author's experience as well as of more recent decisions. Some passages might, perhaps, have been with advantage abbreviated and there might have been a more skilful and harmonious interweaving of the new materials with the old; but, upon the whole, this edition presents the treatise in its most favourable aspect, although the subsequent one,² being published in a more manageable form and at a more reasonable price, may ultimately supersede its more bulky predecessors. The labours of the author upon this subject were brought to a close by the publication of his "Concise and Practical View" of it,³ in which is embodied the whole system of English law on that important head of jurisprudence. This was a task which required much precision and which no man living, except the author, could have satisfactorily performed. Portions of the work were re-written: every proposition, old or new, was profoundly weighed: so many recent cases bearing upon various topics had been inserted and the references were so ample that they sometimes, indeed, appear to be disproportionate to the concise statement of the text: all, however, is correct; all is lucid.⁴

¹ In two volumes, 1834.

² The eleventh edition, 1846, pp. 1072.

³ "Concise and Practical View of the Law of Vendors and Purchasers," 1851.

⁴ It would be unjust to pass over in silence the useful work of Mr. Dart. His "Compendium of the Law of Vendors and Purchasers of Real Estates" embraces the decisions of modern judges; and, so far as these relate to the Land Clause Consolidation Acts, to Railway Acts, and to other matters affecting public companies, the work is original. The object of the author was to produce a work which, without being a merely elementary outline, on the one hand, or a bare index of cases, on the other, might supply the student with a concise and connected statement of the present law and practice relating to vendors and purchasers of real estate and the

The reputation which the young conveyancer had already acquired was not allowed to die away or even to be impaired. He had tried his strength and must have been conscious that he might safely aspire to success in another effort, though it should demand a still more vigorous exercise of his faculties. Nor could he have chosen a subject more suitable to the structure of his mind. The doctrine of "Powers" constitutes one of the most abstruse titles within the whole compass of the law of England and no ordinary mind was required for its simple and intelligible development: but so far are we from discovering anything offensive or ludicrous in the complacency with which Mr. Sugden was wont to refer to his work as *the* book on "Powers" that we conceive it would have been the sheerest affectation on the part of its eminent author to have regarded it, at the period of its publication and during many subsequent years, with any other feelings than those of satisfaction. It was emphatically *the* book on "Powers," although it certainly can no longer claim that exclusive and honourable distinction. "This is the best book," says Kent,¹ "we have on that very abstruse title in the law. It was regarded by the author as his favourite performance, and he is entitled to the gratitude of the student for his masterly execution of the work. It is perspicuous, methodical, and accurate." And we have no hesitation in saying that the work, viewed as a classification and statement of abstract principles, still maintains the high position which was, on its first appearance, unanimously assigned to it. The science, however, is in a state of continual progression; and in an empire boundless and busy like that of England all the branches of the law are living branches and call for unceasing care in the process of evolution. Mr. Powell had preceded Mr. Sugden in the same walk² and the latter did ample justice to his predecessor: Mr. Chance has followed him

practitioner with a portable book of reference to the recent as well as the most important early cases on the subject. The work was published in 1851, and has reached a second edition.

¹ 1 Comm. p. 513.

² "An Essay on the Learning respecting the Creation and Execution of Powers." 8vo. Lond. 1787.

in a treatise¹ which, it must be admitted, is now practically more useful than the original model, inasmuch as new lights have been thrown by decisions of a later date than those to which Mr. Sugden had access on obscure and doubtful points; while, at the same time, the views presented and the doctrines maintained by Mr. Sugden are occasionally discussed with freedom, although always with becoming respect. Still, the one has not displaced the other: both are necessary: many passages, indeed, in the more recent publication would be unintelligible to a reader who has no previous knowledge of the doctrine as stated or illustrated by Mr. Sugden; in whose discussions are to be found all the elements for thought and disquisition on the subject. The great fault of Mr. Powell, as a writer—a fault which pervades his work on Contracts as well as that on Powers—is his tediously minute statement of all the details of cases, without perceiving, or, at all events, without taking the trouble to direct attention to the real point decided in each: nor is his statement of facts at all times intelligible when tested by the reasons upon which judgment appears to have proceeded. Now, these were precisely the defects which Mr. Sugden, above all other men, was signally qualified to cure. With his vigour of intellect, his habits of accurate research, and power of generalization, he could not fail to mould the materials which, till then, had been scattered loosely around him, into a compact, symmetrical form. By means of great labour and consummate skill he extracted the principles from all the cases, and, marking the relations subsisting among these principles, all analogies and differences, latent or more apparent, he assigned to each its proper and natural position and thus succeeded in constructing a work at once simple, harmonious and complete; and when it is known that the “Treatise on Powers” was composed during brief intervals snatched from the labours of his profession, those who are most familiar with the distracting influence of such avocations will be the foremost to admit and to admire the capacity which, amid many interruptions, could return to

¹ “A Treatise on Powers.” By Henry Chance. 8vo. 1831; and in 1841 a supplement to the original work, bringing down the enactments and cases to the latter date, was published.

the task and weave so unbroken and beautiful a chain of abstract reasoning. In respect of profound learning and logical precision, simplicity and vividness of style, it may fairly be regarded as rivalling the great masterpiece of legal composition,—the “*Essay on Contingent Remainders*.” It would be idle and beyond the scope of this article minutely to examine, and laboriously to collate the respective merits of the various editions of this celebrated production—the “*Treatise on Powers*,” which first appeared in the year 1808. It may be sufficient to state that it has grown from its infancy up to its present large and mature dimensions under the anxious, parental care of its author. At each successful stage of its progress it has assumed, under his experience, a more attractive and more useful form: excrescences have been lopped off and deficiencies supplied, until it has, at last, appeared as a perfect legal work. In the third edition, for instance, which was published in the year 1821, and in a brief, well-written paragraph was inscribed to Lord Eldon,¹ considerable additions were made to the work and all the cases which had occurred between that and the preceding edition, many of them not having been, at that time, reported, were discreetly inserted. Again, in the course of ten years, two other editions had been demanded by the profession, all the intervening cases having been, on each occasion, duly weighed and applied. After the lapse of more than a quarter of a century from the first appearance of the work the author found himself at leisure to review his earlier labours, and, accordingly, he, for a time, devoted himself, to the exclusion almost of all other pursuits, to so thorough a revision of his favourite treatise that, in the year 1836, it came forth from his hands in an enlarged and improved form.² The general arrangement was partially altered, wherever the author conceived that he could thereby adjust the parts in more natural order: errors, whether detected by himself or brought under his notice by the suggestions of others, were corrected: ambiguities were explained;

¹ “A judge,” thus wrote the author of the “*Treatise on Powers*,” “who has so often excited the admiration of the Bar by a display, without effort, of an extent of knowledge in every branch of jurisprudence which the life of man appears to be insufficient to acquire.”

² “*Practical Treatise on Powers*,” 6th edit. This edition is in two vols.

and throughout the work were interspersed such reflections of the author and such criticisms on the various authorities as serve to fasten the attention of the reader and the practitioner upon all the leading principles of the topic discussed. Nor had the treatise yet closed its triumphant career; for, in the year 1845, there appeared a seventh edition,¹ in which, as in its predecessors, were incorporated the more recent decisions and such alterations as the Real Property Acts had rendered necessary.²

These treatises, framed on strictly philosophical principles, admitted of continual expansion without destroying the proportions of any of the parts; so that there is as much merit in the conception as in the execution of each entire composition. The rare endowments of Mr. Sugden might have been by all, and by many were, discerned in his first efforts. Pupil after pupil³ carried away with him from chambers a deep impression of his professional attainments and skill, and gradually his reputation began to fill a larger space within legal circles. He brought so

¹ This edition is more than double the size of the original work. To this edition, likewise, there is prefixed that which originally appeared as an Introduction, by Mr. Sugden, to his edition of Gilbert on Uses (Gilbert's Law of Uses and Trusts, 3rd edit. with notes, 1811), and which comprises an excellent outline for the student on his commencing the study of the science of conveyancing.

² Before quitting this subject, we may allude to a "Letter" which was addressed by Mr. Sugden to Sir Samuel Romilly, in the year 1814, "On the late Decision, upon the Omission of the Word '*signed*' in the Attestation of Instruments executing Powers." That word had never been considered essential to the validity of a deed; and even where a doubt on the subject had been started (*vide* *M'Queen v. Farquhar*, 11 Ves. jun. p. 467), the opinion of almost every man of eminence at the Bar was, that any objection to the old, common form, "sealed and delivered," was groundless. A considerable difference of opinion on the point, however, had been expressed by the judges; and the object which Mr. Sugden contemplated in addressing Sir Samuel Romilly, was simply to examine all the cases which touched the point at issue, in connection with the Act 54 Geo. 3, c. 168, generally known as "Mr. Preston's Act,"—an Act which Mr. Sugden conceived was only a partial remedy for the evil which it professed to remedy. While he disclaimed in this Letter any intention of disparaging the opinions of those judges who thought that the word "*signed*" ought to be inserted in the attestation he, at the same time, entered upon a "manly" inquiry into the grounds of a decision which materially affected a vast number of titles: and he performed his task acutely and dispassionately.

³ Mr. Tyrrel, the eminent conveyancer, who died in the year 1840, was, we believe, Mr. Sugden's first pupil.

much mind, so much independent, vigorous thinking to bear upon every topic which he touched, that, subtle and refined though his learning was on all the nice *minutiæ* of scientific conveyancing, he very soon gave proofs that he was not less eminently qualified for oral discussion in court.¹ In a system so essentially artificial and intricate as that of the law of real property in England the immediate transference of property from one owner to another, the effectual settlement of it so as to meet the wishes and frequently to reconcile, as far as possible, the conflicting interests of various parties, or, the transmission of it, in safe and legitimate channels, through a long course of descent, demands incessant vigilance as well as great experience on the part of the lawyer who undertakes to carry out in a binding form any one of these processes; providing for future contingencies without infringing the rules of law or the conditions of prior, subsisting, valid instruments. It may easily be supposed that the views, retrospective and prospective, by which the conveyancer—we mean, of course, the intelligent and reflecting conveyancer, not the merely mechanical copyist from precedent-books—has been guided, can be fully known only to himself, and that he alone can satisfactorily expound his own draft; can prove the aptness of its language to the attainment of the proposed end; can point out the coherence subsisting between its various parts; and maintain against the objections of those less familiar than himself with all the transactions covered by it and consequences involved in it the validity of the deed in all its integrity. It was, at all events, under some such impressions as these that a few of the most distinguished in this branch of the profession, yielding to a natural love of their own offspring, followed the latter out into the world, in the hope of protecting it against all unfair attacks; and many a weak and unpromising bantling has thus, under parental care, grown up into vigour and enjoyed long life. Mr. Sugden followed the example of his fellow-practitioners and in or about the year 1817 began to make his appearance in court. From that

¹ On the strength of the learning displayed in his publications he was appointed receiver of the rents on the estates of the Duke of Northumberland,—one of the largest properties in the kingdom.

time down to the year 1822, when he was appointed a King's counsel, his business and reputation continued steadily on the increase: the honours of the cautious and skilful advocate were daily added to the distinction which he had already acquired as a sound lawyer; and, the sphere of his practical knowledge and tact being thus enlarged, the pliancy of his mind proved equal to the comprehension of the multifarious topics which were in quick succession presented to it. He was remarkable for his ever-wakeful activity of mind; and quickness of apprehension, combined with his familiar knowledge of all the practical details of conveyancing, gave him an advantage over even his more able competitors. Few could compete with him in depth and variety of legal attainments: none were more acute in detecting real flaws or inventing those which, after all, were, though plausible, purely imaginary; and none were so well prepared to meet sudden emergencies or to turn unforeseen events and incidental disclosures to the benefit of his client, in whose service he made it a point of honour as well as of conscience, to evince, within the proper limits of professional etiquette, incorruptible fidelity and unflinching zeal.¹ His style was smooth and equable: it was a calm and clear fluency, as distinguishable from noisy, turbid volubility: weighty and well-connected thoughts were easily visible through diction so simple as to be

¹ His sincerity was, on one occasion, put somewhat ludicrously to the test. In the case of *King v. Turner*, heard on the 26th of July, 1829, Mr. Horne and Mr. Pemberton having been heard on one side, Mr. Sugden heartily concurred in the arguments of these learned gentlemen and confidently stated that the law of the case was perfectly clear. "Then," remarked the Vice-Chancellor, "Mr. Sugden is with you, Mr. Horne." Mr. Horne said, that the argument of his learned friend was certainly, to his surprise, on his side, but that his learned friend happened to be on the other. Mr. Sugden, amidst much laughter, turned round to his junior, Mr. Jacob, and, after a moment's pause, frankly admitted that he had mistaken his side; and hoped that his Honour would decide the cause without reference to any suggestion which had dropped from him. The Vice-Chancellor promised to do so. Other eminent counsel have sometimes fallen into a similar blunder; but, upon discovering their mistake, they contrived adroitly to elude its consequences by boldly stating that they had been putting hypothetically before the judge the case of their opponent, and then proceeding coolly to demolish the fabric which they had, a few minutes before, laboriously reared. Mr. Sugden could not, or would not, have recourse to such artifice. The theory which in his dilemma he affected to prescribe to counsel is impracticable: the truth is, he was disconcerted and could not recover himself.

transparent. The few words which Cicero wrote concerning Lysias may be strictly applied to Mr. Sugden:—"Nam qui Lysiam sequuntur, causicum quemdam sequuntur; nec illum quidem amplum atque grandem; subtilem et elegantem tamen, et qui in forensibus causis possit præclare consistere." His manner, too, was generally pleasing and attractive, though always grave. Occasionally, no doubt, he may have betrayed impatience and fretfulness; but those members of the Bar who have themselves experienced the feverish irritability engendered by exhausting avocations and a solicitude for the interests of clients, will be now, as they were throughout Mr. Sugden's career, the first to pardon an apparent peevishness which they can so easily and innocently explain. It is not our intention to accompany him through all his professional contests—his triumphs and defeats. Such an attempt would be nothing short of an outline of almost all the important causes which were argued in court during a considerable portion of the time of Lord Eldon. When he was called within the Bar to maintain his ground against such adversaries as Bell, Hart, and Heald, he left in his rear a scarcely less formidable band in the persons of Pepys, Pemberton, and Knight, besides a host of juniors who were then firmly taking up a position which they held until, in due time, they were in their turn invited to occupy the advanced posts of the profession.

We have already alluded to the circumstance of Mr. Sugden having recourse to the epistolary form of communication on occasions when he wished to call the attention of the profession or the public to topics not indeed unimportant in themselves, but so simple, so limited, or so evanescent in their operation as to demand discussion without delay, and without much ceremony. As early, for instance, as the year 1812, he had in this manner thrown out some sagacious observations¹ on the expediency of repealing the first Annuity Act (17 Geo. 3, c. 26); the object of which had been to guard against the further pro-

¹ "A Cursory Inquiry into the Expediency of repealing the Annuity Act, and raising the legal Rate of Interest; in a Series of Letters." In Letter VII. pp. 39—46, will be found a very clear and concise view of the various opinions which have been entertained concerning the morality or immorality of making interest upon money.

gress of what was called in the preamble of the bill, "the pernicious practice" of raising money by the sale of life annuities, and the risk of promoting such practice "by the secrecy with which such transactions were conducted," by enforcing, under certain regulations, the public enrolment of all grants of life annuities. Mr. Sugden took the liberty of doubting whether the intention of the Legislature had been effected: he suspected that evil, not good, had resulted from the passing of that statute; and argued that, even although, according to the preamble of the bill, "the pernicious practice" of raising money by the sale of life annuities had been promoted by the secrecy with which such transactions were conducted, the converse of the proposition would assuredly not be realized by means of the publicity given to them. Subsequently to the repeal of the Act complained of the subject of the usury laws began to excite attention; and Mr. Sugden thought he might opportunely republish his pamphlet with such additional remarks as seemed to be naturally suggested by the new state of affairs;¹ and in the course of his observations he avowed that "the best though boldest, measure would be at once to sweep from the statute-book all the laws against usury, and so leave money, like other commodities, to find its level." At the same time, topics more strictly professional were constantly, even during the busiest periods of his life, attracting his attention;² and on all of these, as we shall

¹ "Considerations on the Rate of Interest and on Redeemable Annuities." London, 1816. Compare his speech in the House of Commons (19th June, 1828), on the motion of Mr. P. Thompson, for the second reading of the Usury Laws Amendment Bill. This was a subject to which Mr. Sugden had given much thought and close observation. He was of opinion that the commercial body and the landed interest were equally sufferers by these laws: the former evading them by tricks, and the latter by the borrowing of money on annuities; while by means of these annuities not only was the rate of interest against the borrower raised but a certain amount of capital was locked up. Some benefit, no doubt, had arisen from them. He had arrived at the conclusion respecting the Usury Laws that, though in many cases injurious to all classes of the community, a total repeal of them would be attended with some evil consequences. He, however, preferred such total repeal to the measure proposed by Mr. P. Thompson. *Vide* also the few remarks which dropped from Sir Edward Sugden on the 2nd of May, 1828, when Mr. P. Thompson moved for leave to bring in his bill.—*Hans. P. D.* vol. xix. p. 828.

² Among other ephemeral productions Mr. Sugden published, in the year 1819, "A Letter to Charles Butler, Esq. on the Doctrine of pre-

speedily have occasion to observe, he brought to bear sound information, arranged and applied by the exercise of highly discriminative powers of mind.

His industry was crowned with almost unprecedented success : his professional income was rapidly and enormously augmented : he forthwith purchased property,¹ more extensive than fertile, in the county of Sussex ; and, having thus a permanent stake in the country, his ambition for honourable exertion naturally took a wider range. Nor was there, indeed, any dignity within the sphere of his profession to which he might not fairly and without presumption aspire. Political services, however, if not partisanship, have been, prudently or otherwise, generally regarded in this country by the men in power as strong recommendations, though not essential qualifications, on the part of the recipients of government patronage ; and accordingly Mr. Sugden, finding that his professional labours had, by dint of his own early industry and mental discipline, become comparatively easy and light and that he thus had at his command leisure hours which might be devoted to other interests, conceived that he might, beneficially to himself and the public, occupy a seat in the House of Commons. At so early a period even as the year 1818, Mr. Sugden, on the express understanding that Sir Godfrey Webster had withdrawn from the representation of the county of Sussex, entered the field, pledging himself to discharge, in the event of his being returned, his senatorial duties upon independent constitutional principles ; and, encouraged by positive promises of support from some of the freeholders and almost equally effective assurances of neutrality from others, he had every reason to hope for success, when Sir Godfrey Webster, notwithstanding his public announcement that he had no intention of soliciting the suffrage of the electors, unexpectedly made his appearance and was duly returned. The

suming a Surrender of Terms assigned to attend the Inheritance." The doctrine is therein fully and ably discussed.

¹ Tilgate Forest Lodge, in the parish of Slaugham, which forms a portion of Tilgate Forest. The soil is sandy, and generally very poor ; the surface being diversified with hill and dale, and crested with birch and underwood.

object of the manoeuvre was obviously not so much the triumph of Sir Godfrey Webster, who would probably rather have avoided the scene, as the defeat of Mr. Sugden, who had, at least, the satisfaction of plainly telling the baronet that he was not a fit person to represent the county, inasmuch as he neglected his parliamentary duties. Sir Godfrey was a favourite; and so serious a charge levelled against him publicly, and to his face, roused the indignation of the baronet's friends. Mr. Sugden, however, contrived with his usual tact to pacify the offended and noisy crowd. Sir Godfrey having been declared one of the sitting members, he and Mr. Sugden cordially shook hands, and the affair terminated.¹

Subsequently, however, he was more fortunate in his appeal to other constituencies; for he sat in parliament as member, successively, for Weymouth, St. Mawes, and Ripon. Having been, in the year 1828, after his return for the first of these constituencies, appointed Solicitor-General, he was again returned; and once more sat as member for Weymouth after the general election consequent upon the death of George IV. Out of the proceedings connected with these Weymouth elections much warm discussion and some curious correspondence arose; and it was in allusion to such transactions, that, during the stormy session in the spring of the year 1831, Sir Edward Sugden vindicated himself in his place in parliament against an attack which had been made upon him by Mr. O'Connell and which was founded on statements which had appeared in the daily newspapers.² He called upon his accuser to substantiate, if

¹ This was his first, though not his only defeat; for, after the passing of the Reform Bill, he twice contested the representation of Cambridge with Mr. Spring Rice, now Lord Monteagle, and was, on both occasions, as we have already hinted, defeated. He passed through the struggle, however, with great credit to himself.

² It is only fair to the memory of Mr. O'Connell to state, that he had allowed himself to be entangled by the arts of an obscure informer. Sir E. Sugden having been called upon to disclaim certain letters alleged to be in his handwriting, admitted that it was difficult for him to do so until he saw them, in consequence of his letters being, in nineteen cases out of twenty, written in court, where it was impossible for him to take copies of them. From certain expressions, however, which occurred in the alleged documents, he felt persuaded that he had not written the letters

he could, any charge against him : he was ready to meet it ; but he protested against those covert attacks, " founded on statements of which the basest and most scandalous use had been made." It had been asserted that he had taken improper means of securing a seat in the House of Commons, with a view to his being elevated to judicial station. " That is no new charge," continued Sir Edward Sugden, " and I throw it back with the contempt which it deserves. All who know anything of me, know that I have no desire for judicial station : I wish only to win my way by the regular course of my profession : I wish to be independent, and to gain that independence by my own professional exertions." He solemnly declared, that the charges and insinuations thrown out against him on the score of the expenses in connection with these elections, were totally false ; and concluded with the observation, that " as, on the one hand, he had always been averse to courting a quarrel, so, on the other, he should always be anxious to prove that he never would flinch, in the House of Commons or elsewhere, from maintaining his character in such a manner as it became every gentleman to do." This was, in short, a sharp skirmish, in the course of which Lord John Russell, who had shown an inclination to throw his weight into the scale against the member for Weymouth, did not escape unscathed from the fiery darts of the latter.

The reception which Mr. Sugden, on his first appearance in the House of Commons, experienced was by no means flattering. He met with interruptions so rude, on the part of a few of his political adversaries—among whom Mr. Hume and

imputed to him ; and he challenged Mr. O'Connell to produce the originals.—*Vide* Hans. P. D. for the year 1831, pp. 1277, 1278. Those who feel any curiosity on the subject may be referred to various statements and letters which appeared in the *Times* newspaper, on the 6th, 8th, 9th, 11th, and 13th of April, 1831, respectively. In the communication inserted on the 8th, Sir E. Sugden distinctly states, that *all* the expenses of *all* his elections at Weymouth were paid by himself, and that therefore the allegation that " they were paid or repaid by Col. Gordon, or his agent, or any other person, is altogether false : " and this statement he reiterates on the 11th of April. Indeed, in the minds of those who knew anything of his hostile correspondent,—a gentleman who many years ago could boast of considerable court-of-session notoriety in Edinburgh,—there never was the slightest doubt as to the side on which the substantial truth lay in this election squabble.

Mr. Roebuck were conspicuous—who knew not, or could not appreciate the masculine character of his mind, that, master though he was of logical precision, and fluent though he generally was of speech, he actually felt a difficulty in giving expression, even in his own simple style, to the ideas which were passing through his mind. The unfavourable impression, however, may, in some measure, be ascribed to himself. The truth is, that either he had not the power, or had not the will, to amuse or fascinate his audience with sallies of wit or the embellishments of oratory: he addressed the Speaker of the House of Commons precisely as if he had been talking to a judge in a court of equity: he forgot that those whose minds he wished to convince, whose sympathies he ought to have awakened, and whose favour he sought to win, formed an assemblage of individuals composed of all conceivable varieties of opinion and sentiment; and, consequently, while his speeches at the Bar seldom failed in conducting him to the end which he had in view, those delivered in the House of Commons were far from being equally effective or popular. He speedily succeeded, however, in commanding the respect of his most obstreperous opponents; and by the accuracy of his knowledge and the conciseness of his statements secured a patient hearing from both sides of the House; and uniformly willing to extend forbearance to others, he was, at the same time, prepared to meet any unjust or wanton attack upon himself with a spirited repulse. He shrunk not from breaking a lance with O'Connell himself; and, within a very short period, he had acquired so much confidence in his own strength and had taken so accurate a measure of that of his adversaries as apparently to take delight in provoking them to the combat and pursuing them when defeated “from *Dan*” even to the borders of the Whig benches.¹

¹ A dull debate, for instance (5th February, 1838), on the Parliamentary Electors Bill, was enlivened by one of those scenes which, in the keenness of party spirit, sometimes occur in the Lower House. “He had only talked,” remarked Sir Edward Sugden, “of obeying the law, and had said nothing of altering the law: to obey the law was the duty of Conservatives; but perhaps the honourable member for Dublin did not fully understand that duty.” Whereupon Mr. O'Connell observed, that “He would not say whether his obedience to the law was or was not greater than that of the honourable gentleman; he regretted, however, that the

Although it would be a tedious and certainly an unprofitable task to follow the eminent subject of this notice through all the minor scenes of his parliamentary life or minutely to unfold all the occasional topics of merely transient interest¹ which engaged his attention, still it may be proper to take a cursory glance at the more prominent points of controversy on which he, at different times, more or less fully expressed his opinions. No member of the House of Commons discharged his public duties with more enlightened fidelity and zeal than Sir Edward Sugden. He had deeply at heart the welfare of the people throughout the wide extent of the British dominions and was the advocate of a temperate and impartial policy towards all classes and under all circumstances. Questions of constitutional law, of

right honourable gentleman should have lost his temper." *Sir E. Sugden*: "I can assure the honourable member for Dublin that I have *not* lost my temper." *Mr. O'Connell*: "Then all I have to say is, that the right honourable gentleman can say an uncivil thing in good humour—that's all." The last retort, dropping from the lips of O'Connell with a truly Milesian leer, was irresistible. Mr. O'Connell, however, was too shrewd a man not to perceive the intellectual power of Sir Edward Sugden. Indeed, on another occasion he admitted, that if there was any man in England who knew *all* the law, Sir Edward Sugden was that man. It may be here remarked, in proof of the high estimation in which Sir Edward Sugden was held by his own party, that, in the year 1838, he was talked of as the fittest person to be put in nomination against Mr. Abercromby for the Speakership. It was thought prudent, however, to abandon the idea of opposition.

¹ On the occasion of the East Retford Disfranchisement Bill being introduced (27th June, 1828), he voted for the transfer of the franchise to the hundred, on the ground that great benefit had arisen from the adoption of a similar course in the case of Shoreham. When the conduct of General Darling, governor of New South Wales, was under the consideration of Parliament (17th June, 1830), Sir E. Sugden vindicated the character of General Darling and maintained that his conduct had been neither illegal nor improper. He opposed Mr. R. Grant's motion on the Regency question (16th July, 1830), and carefully examined all the leading precedents on the subject. He admitted (13th December, 1830), in the debate on the supplies, that sinecure offices were a great burden on the country, and that there was no defence for patent places; but maintained that it was absolutely necessary that every administration should have some places, or other means of liberality, as aids to carrying on the government of the country. He strongly objected to Lord Althorp's proposition (11th February, 1831) of imposing a transfer-duty on funded property, a measure which he denounced as a violation of national faith; and, on the 22nd of February, 1831, he questioned the policy of Lord Howick's plan of emigration. He declared that, though he had no objections to *facilitate* emigration, when necessary, he was not disposed directly to *encourage* it: that subject he considered to be clogged with many difficulties.

colonial policy, or of social arrangement, from a royal grant down to an Irish election-subscription fund, were with equal facility apprehended and illustrated by him : no topic was in its nature so intricate or in its consequences apparently so trivial as to prevent him from disentangling the one or demonstrating the possible ultimate importance of the other. He took, for instance, an active part throughout the whole of the debate on the point of Privilege,¹ arising out of the much-agitated cause of *Stockdale v. Hansard*—a debate which called forth the powers of the most distinguished lawyers in the House. It was his impression that the House was not justified in publishing reports of their proceedings in the manner which was then pursued. Again, he carefully perused all the papers on the Jamaica question ; and confessed, that the more he read and pondered the facts presented to him, the more satisfied was he, that there was no ground for the proposed suspension of the constitution of that colony. It by no means followed, he held, that because the party to which he belonged had thought it necessary to suspend the constitution of Canada, a similar suspension of the constitutional rights of other colonies would be justifiable.²

Sir Edward Sugden had been, down to the year 1829, a strenuous opponent of Catholic emancipation ; but when Sir Robert Peel, in the beginning of that year, proposed to deal with the question in connection with the suppression of the Roman Catholic Association in Ireland, he was, as many others were, induced to give his support to the minister, and to sacrifice the strong opinions which he had hitherto advocated, in the hope of conciliating the loyal affections of that portion of the body politic which ever since has, in spite of the infallible panacea then administered, been writhing in all the agonies of sacerdotal turbulence and religious intolerance. He thought it

¹ *Vide* Hans. P. D. vols. li. lii. liii. He highly complimented Mr. Serjeant Wild (now Lord Truro) on the erudition displayed by him on that occasion.

² *Vide* Debate, 30th May, 1839. The distinction taken by him^s was founded on the fact, that the supplies had been wantonly stopped by the Canadian Assembly,—an extreme measure, which, while it was the exception in the mother country, had become the rule in the colony.

expedient that both measures, as proposed by government, should have his support. It is quite obvious, however, from the language which he employed in the course of the debates as well as from the views which, it was well known, he entertained, that in following at that time in the wake of Sir Robert Peel he was doing violence to his reason and had consented to suppress rather than to abnegate his former sentiments. He can no more be justified in the course which he, on that occasion, pursued than can the great leader who seduced him into the political snare. So sudden was his conversion on this point that, while he expressed his surprise at the measure of emancipation having been recommended in the speech from the throne, he perceived, all at once, that it was "the only course which could ensure the safety of the constitution," and professed himself prepared to sanction it, accompanied as it was alleged to be with other measures for the amelioration of the people of Ireland. Once resolved to abandon his principles, the acute and well-practised mind of Sir Edward Sugden found no difficulty in devising flimsy apologies and framing specious arguments in defence of the line of policy into which he had been, perhaps unwillingly, drawn; and he appears to have soothed his disquieted conscience by the reflection that the bill provided for Protestant ascendancy. Pretending to be satisfied with a species of intellectual hair-splitting, he assisted, though with ill-disguised misgivings, in opening those flood-gates of the constitution which have never since been fully closed. But his faculty of taking nice distinctions was allowed to sleep when he weighed the respective claims of the Catholic Association and the Brunswick clubs; and, although he admitted that when the latter were instituted in Ireland their formation was necessary as a counterpoise to the former and that, if he had lived in Ireland, he would have joined one of them, he could see no occasion for such a club in England, and, accordingly, conceived that it should be, along with the Catholic Association, suppressed: in other words, that an assemblage of loyal men, united in defence of Church and State, ought to be put in precisely the same category with an organized body of malcontents who aimed at the overthrow of both. It cannot be

denied, that, at this juncture of his public life, Sir Edward Sugden betrayed symptoms of a shifting policy. By some his conduct will be applauded, as a wise adaptation of his views to the paramount necessities of society; while by others it will be condemned as an instance—the only one, we believe, throughout his long career—of that laxity of political principle which has more recently become the bane and the scandal of the age.

But he amply redeemed his character for consistency by the steady and persevering resistance which he offered to the Reform Bill throughout all its stages. He examined its details, exposed its defects, and invoked the members of the House of Commons to divide upon the various clauses with fair and unbiassed minds. Even after the bill had been sent into committee he would cheerfully have applied all the powers of his mind to the amendment of its details so as to promote the facility of carrying the measure practically into effect. The House of Commons, however, was not then in a humour to listen to reason or argument. His suggestions were, one after another, so unceremoniously thrown aside, that he saw the futility of wasting the time of the public and expending his own energies in an unequal and hopeless struggle.

Thwarted though he frequently was in his political opinions the slightest suggestions of Sir Edward Sugden on any subject relating to the theory or practice of the law of England, especially as that law is administered in courts of equity, were universally received with the utmost attention and respect. At the same time he was opposed to rash innovation and turned aside with gentle irony the ill-directed shafts of too sanguine reformers.¹ He avowed at an early period of his career that the law of property, as administered in the different forums of this country, exhibits, if we make allowance for the imperfections which cling to all human legislation, a most splendid and comprehensive code of jurisprudence;² and he dreaded the fact of its being tampered with by those who forgot the advice

¹ *Vide* "A Letter to John Williams, Esq. in Reply to his Observations on the Abuses of the Court of Chancery." By E. B. Sugden, Esq. London, 1825.

² *Vide* "Series of Letters to a Man of Property," pp. 3, 5.

of Lord Bacon, in his portraiture of a good judge, that "he should draw his learning out of his books, and not out of his brains."¹ Condemning all propositions which might contemplate a subversion of the existing law of real property he had no objection that any rubbish which time had cast over some departments of it should be swept away.² But he looked with alarm on the disposition which prevailed to strike, under the pretext of amendment, at the root of a system under which the country had, for ages, flourished. Laws, he believed, are not so much the creation of the wisdom of man as the gradual growth of time; and nothing can be more absurd than to suppose that any individual, however profound his wisdom or extensive his knowledge, could frame a code of laws for the purpose of governing the property and rights of a people in so complicated a state of society as that of England. He therefore questioned the policy of setting the minds of men afloat upon points which long experience had sanctioned, even although the reasons which originally suggested them, or the principles upon which they were founded, might not be immediately apparent.³ Law, as we have already hinted, is, and must be, a science; and for that reason, Sir Edward Sugden was opposed to the scheme of codification. Supposing the plainest law possible to be enacted to-day, the interpretation of that law must, in the course of time, necessarily be a subject of scientific exposition.⁴

¹ *Vide* "Speech delivered in the House of Commons on the 11th of December, 1830, by Sir E. Sugden," p. 23.

² *Vide* *Hans. P. D. (N.S.)* vol. xviii. pp. 898, 902; 29th Feb. 1828.

³ 29th February, 1828.

⁴ Compare with the matter to be found scattered through his speeches in Parliament "A Letter to James Humphreys, Esq., on a Proposal to repeal the Laws of Real Property, and substituting a new Code." By E. B. Sugden. Lond. 1826; pp. 27, 30. His remarks were well received by Mr. Humphreys, who rejoiced that the subject had attracted the attention of Mr. Sugden. *Vide* the "Letter" of that gentleman to Mr. Sugden, in reply to the above. It was published in the year 1827.

It may here be remarked, that Sir E. Sugden has always been opposed to the establishment of a general register for deeds and instruments affecting real property in England and Wales. When the bill for the attainment of that object was moved for by Mr. (now Lord) Campbell, on the 16th of December, 1830, Sir E. Sugden, while he disclaimed any intention of offering captious opposition to the measure, hinted that he would take a future opportunity of stating how far and why he differed in opinion from Mr. Campbell; and accordingly, on the 11th of October, 1831, he

Throughout all the debates which took place on the Suits in Equity Bill, during the month of June, 1830, Sir Edward Sugden was in his place to require explanations or to suggest amendments; and in every question involving the administration or amelioration of the law he took a deep interest. In the debate on the subject of punishment of death for forgery (7th June, 1830), he stated that he considered the clause which abolished capital punishment for forging deeds a dangerous alteration; and, even if the bill were passed, the Legislature would still have to contend with public sympathy.¹

In the year 1835, he was, under the administration of the Duke of Wellington and Sir Robert Peel, appointed Lord Chancellor of Ireland, and the duties of that high office he discharged, as might have been anticipated, with distinguished success. His tenure of office was, on this occasion, of short duration. His decisions, however, within the period of his official residence in Ireland, furnished materials for the publication of a small volume of reports,² the contents of which bear ample testimony to his high judicial qualifications. Indeed, the Attorney-General for Ireland acknowledged, on behalf of the Bar, the deep sense entertained by one and all of that learned body, of the eminent ability with which he had discharged the duties of his high office.

"Short as has been the period," said he, "of your lordship's elevation, it has afforded ample opportunity for the display of judicial powers of the highest degree of excellence. Had that period

referred to many of the provisions of the bill as having an injurious tendency; upon the whole, he believed that the evils attendant upon the proposed plan would more than counterbalance any benefits which might possibly flow from it. A similar system had, he knew, proved mischievous in Ireland. Right or wrong, he has proved a formidable adversary to the recognition of the scheme in England. On such a subject every word from such a man carries with it great weight. No ministry, indeed, would, without much pressure, act in opposition to his expressed opinion.

¹ Any minute delineation of the strictly legislative labours of Sir Edward Sugden would be a work of supererogation. It is sufficient to refer the reader to "*Sir E. B. Sugden's Acts: with Notes,*" by Mr. Atkinson; and "*The Trustee Act, 1850,*" by Mr. Headlam.

² "*Reports of Cases argued and determined in the High Court of Chancery in Ireland, during the Time of Lord Chancellor Sugden, from the Commencement of Hilary Term, 1835, to the Commencement of Easter Term, 1835.*" By B. C. Lloyd and Francis Goold, Esqrs., Barristers-at-Law. London, 1836.

been still shorter—had it been limited to the observation of a single day, it would have been sufficient to have impressed us with an indelible conviction of the profound, extensive, and accurate learning, the patience and discrimination, the masterly exposition and application of the principles of equity ; and, above all, of the ardent love of justice and elevated tone of moral feeling which marked and distinguished your judgments.”

After the change of administration in the year 1841, when Lord Lyndhurst received the seals, Sir Edward Sugden was again appointed Chancellor of Ireland ; and his nomination gave general satisfaction.¹ His last appearance, we believe, in the House of Commons, was on the 20th September, 1841, when, in allusion to that appointment, he vindicated himself from a charge made against him by the present Lord Truro, who imputed to him an unconstitutional act in his taking his seat in the House of Commons subsequently to his having accepted office under the crown. His defence was, that he had only consented to fill the high office offered to him but did not then legally fill it ; and that he considered it his duty not to abandon the trust reposed in him by his constituents until he had lost it in law. The House, he hoped, would acquit him of any improper feeling or presumption.²

Even when raised above the necessity of legal investigation his thoughts still continued to flow in their wonted channel ; and, accordingly, in the year 1849, he favoured the profession with the results of the first attempt which had been made to embody in the form of a treatise the decisions of the House of Lords on the law of property.³ Some of his contemporaries

¹ He took his seat in the Court of Chancery in Ireland on the 2nd of November, 1841, and held office until the year 1846 ; during which period he introduced many practical improvements into the law of that country. His attention even to the interests of suitors may be seen from the “Orders in Chancery” issued by him: *vide*, particularly, the Order bearing date 12th May, 1842. In illustration of his judicial eminence it is only necessary to refer to the Reports, published by Messrs. Drury and Warren. These Reports form a continuation of the series commenced by Messrs. Lloyd and Goold. The decisions of Michaelmas Term, 1841, are reported by Messrs. Drury and Walsh ; but the latter gentleman having found it impracticable to continue the task, the duty devolved on Mr. Warren, in conjunction with Mr. Drury.

² Hans. Parl. Deb. vol. lix. p. 621.

³ Compare with the Introduction to this work “A Letter to the Right Hon. Viscount Melbourne, on the Present State of the Appellate Juris-

contrived, through the versatility of their powers and the variety of their tastes, to blend with professional and official engagements the cultivation of ancient and modern literature. Lord Brougham had even in early life advanced far into the regions of the pure mathematics and had speculated profoundly on the principles of political science : as he advanced in years he was ever ready to break a lance with a rival through all the gradations of light and heavy reviews ; and to him nothing, from a smart political pamphlet to a grave and excellent treatise on natural theology, came amiss : Lord Campbell spent gracefully hours of relaxation in recording the failings and virtues, the trials and the triumphs of his great predecessors ; but to the law Sir Edward Sugden had devoted his early affections and through a long life he has proved faithful to his first love.

Little remains to be added with which the reader is not familiar. In the late government he held the great seal, and was called to the House of Lords as Baron St. Leonards, of Slaughtam.¹ On the 16th of last December, the ministry, having been defeated on the Budget, resigned, and, consequently, Lord St. Leonards ceased to be Chancellor. As his appointment had been hailed by the Bar as a boon to the public and a just tribute to his political steadfastness and professional attainments so his resignation has awakened among the members of the equity Bar one common feeling of regret. Urbane, patient and profound, he daily gave evidence that his powers of quick apprehension were still, under the weight of four score years, unimpaired and that his stores of legal knowledge were still fully at his command. It is not probable that one so far advanced in age can be again induced, under any circumstances, to quit the calm of domestic scenes and encounter the anxieties and fatigues of judicial office ; but, besides enjoying the satisfaction which springs from the consciousness of a well-spent

diction of the Court of Chancery in the House of Lords," which was published by Sir Edward Sugden in the year 1835. At all events, the copy of it in our hands bears that date : it is, however, the second edition.

¹ The armorial bearings of Lord St. Leonards are :—az. a fesse or, in chief three women's heads couped at the shoulders, proper, vested and crined or ; in base, a leopard's head of the last ; in crest, a leopard's head erased or, ducally gorged az.

life, he may console himself with the reflection, that he has carried with him into retirement the esteem and admiration of the members of that profession which he has so long enlightened and adorned.¹

Lord St. Leonards, although rather below than above the middle height, must have been, in early life, extremely handsome. Even now, his countenance retains much of its expressiveness. He looks younger than he really is. His countenance is oval in form, but the features are, of course, sharper and more angular than they were when he was in his prime. He has clear dark eyes which give much quiet and thoughtful animation to his otherwise highly intellectual expression of countenance. He has always been remarkable for simplicity and neatness in his dress.

Such is an accurate though rapid outline of the professional and parliamentary career of this eminent and most estimable man; and those who are most familiar with his mind cannot fail to perceive that the portrait is faithful to the original: there has been neither a colouring nor a softening of the features. The maxim of Tacitus has been present to our mind, "*Ne quid falsum dicere audeat; ne quid verum, benevolentid tantummodo, non dicere.*" We have seen him to be, as an author, erudite and scientific; as an advocate, skilful and acute; as a politician, always disinterested and rarely inconsistent; as a legislator, enlightened and patriotic; as a law reformer, sincere, though prudent; and, as a judge, wise, patient and impartial. Surely, surely Mr. Roebuck, if not Mr. Hume, might have had

¹ Lord Brougham, with that frank generosity of nature and patriotic anxiety for the public weal which elevates him far above the party prejudices which darken and defile inferior minds, bore ample testimony (16th November, 1852) to "the extraordinary merits" of the honourable and learned lord in the conduct of the important measures of law reform which had been passed during the preceding session. "It would be the height of ingratitude," continued Lord Brougham, "on my part, and on the part of any one friendly to these great improvements, to omit any fitting opportunity to testify his sense of the extraordinary labour,—the skilful and learned labour,—which his honourable and learned friend had bestowed on the question of law reform, and the self-denial he had displayed in everything that related to the creation of patronage throughout the whole course of his useful exertions in the preparation of the important measures before the House." It would be presumption to add a single word to this eulogy of Lord Brougham in relation to such a subject.

the charity to suppose that counsels of wisdom might possibly drop from the lips of such a man, even, although he could not boast of having acquired the reputation of being a parliamentary censor or a political declaimer. Although he reached not, nay, aimed not at the oratorical excellence which inflamed the lofty ambition of Cicero—himself the greatest master of the art which he professed and his speeches the most perfect models of the lessons which he taught,—“*Neque vero mihi quidquam præstabilius videtur quem posse dicendo tenere hominum cætus, mentes allicere, voluntates impellere, quo velit*,” his self-knowledge, an exact appreciation of his own powers, led him into an humbler, though perhaps, not less useful walk : “*Temporis igitur ratio, et ipsius dicacitatis moderatio et temperantia, et raritas dictorum distinguet oratorem a scurrâ, et quod nos cum causa dicimus, non ut ridiculi videamur, sed ut proficiamus aliquid.*”

To those who are about to enter or who have recently entered upon the path which Lord St. Leonards has with such unflinching steps pursued this sketch ought to afford at once counsel and encouragement. Few, indeed, can hope to enjoy his intellectual endowments, or, without temerity, dream of rivalling his success ; but all may imitate his early industry and systematic progress, his self-discipline and self-reliance ; and these are the virtues, through which the possessor of them can, in this country, scarcely fail, sooner or later, to be conducted to the attainment of all that is necessary to secure a happy and useful life. No man, perhaps, is less indebted to patronage than the subject of this memoir, and yet he advanced steadily in life. A stranger to ostentation, cherishing quiet and simple tastes, devoted to intellectual labour, he is another instance of the great truth, that duty, sternly obeyed from day to day, guides her willing votary to riches and to honours. Although it is impossible, while glancing at the course run by him, to regard him with other sentiments than those of deep respect, we have not allowed our admiration of his intellectual and moral character to betray us into an extravagant estimate of his merits, or to invest him with accomplishments which he has no pretensions to claim, and which he has never affected to possess.

It is strictly on the fact of his being the most scientific lawyer of the present day that his fame must ultimately rest : as such he may fairly be classed with Hardwicke, Thurlow, and Eldon.

This homage has been paid to the setting, not the rising sun ; but sink when the luminary may, how rich and soft a radiance shall be left behind !

It is gratifying to know, that he has at last reaped the full harvest of his labours. Never did minister of the Crown discharge a more graceful duty than did the Earl of Derby when he called Sir Edward Sugden from his retirement to preside over the councils of the barons of England : nor can any one member of that august assembly, high and ancient though his lineage be, trace with more honest pride the achievements, in field or senate, of his ancestors, than may Lord St. Leonards, conscious of the moral qualities and intellectual exertions through which alone his honours have been won, point to the simple, expressive motto on his shield—“*Labore vinces.*”

E. R.

ART. IV.—LAW REFORM AND ITS PROSPECTS.

AT length there is a common agreement amongst all men—professional and unprofessional, lawyers and statesmen, merchants and country-gentlemen—that law reform is one of the main wants and necessities of the day. The late Lord Chancellor did good service by carrying out many of the recommendations of the Chancery Commissioners ; the Irish law officers of the Derby administration proved themselves worthy of their high position at the Bar, by their proposed amendments in the common law procedure in Ireland ; the new prime minister and the leader of the House of Commons announce that law reform is as much a portion of the basis on which the “amalgamated” cabinet is raised, as is the carrying out of the prin-

ciples of recent financial legislation ; and whilst their Attorney-General, on retaking his office, recommends himself to the continued confidence of his constituents, expressly on his now enlarged powers to amend the law, one of the most acute of modern equity lawyers accepts the office of Solicitor-General, boldly avowing to his agricultural voters that the state of the law of real property is unfit for the exigencies of the age, and that the transfer of an estate in land ought to be comparatively as easy as the transfer of any other species of realised property of the same value, and liable to like particular or general limitations. All men, indeed, are law reformers now, and even those who have heretofore been great friends of "all that is," give in their adhesion to the prevailing cry. The difficulty is great to find out the man who in talk upholds any branch of that law as it stands, but we fear the difficulty would be still greater to discover any large number of men who have applied their minds to a general or philosophical investigation of what this widely called-for reform should consist, or how the good may be "conserved" and extended, whilst the defective parts are cleared away. Restoration, under any circumstances, is no light task ; and restoration is most troublesome where the defects have been long accumulating. Nearly two hundred years ago, John Evelyn asked, in terms not very choice and not very complimentary, "Will ever those swarms of locusts, lawyers and attorneys, who fill so many seats (in parliament), vote for a public *register*, by which men may be secured of their titles and possessions, and an infinity of suits and frauds prevented ? Immoderate fees, tedious and ruinous delays, and tossings from court to court, before an easy cause, which might be determined by honest gentlemen and understanding neighbours, can come to any final issue, may be numbered amongst the most vexatious oppressions that call aloud for redress." And as they called aloud then, so they continued to call, with no effect, till after the accession of George IV., with very small effect during the reign of William IV., and with better prospects, but with little more permanent force during the first years of her present Majesty. Had, however, honest John lived till the present times, he would have been able to dismiss some of the strongest

of his expletives against lawyers ; for he would have found that whilst the occupant of the woolsack had started in the race of legal reform, and had jumped *per saltum* to the lead of the law reformers, counsel had betaken themselves to the "Law Amendment Society," and the members of the lower, though not inferior branches of the profession, the "lawyers and attorneys," had formed themselves into "the Metropolitan and Provincial Law Association," for the express purpose of furthering those practical ameliorations in our laws which have been demanded for two centuries, and are still to be accomplished.

We are very far from undervaluing the changes which have already taken place in the practice of the different courts. So far as they have gone they have worked well ; but, even in the practice of the courts, there is a vast field for improvement.

The three important Acts for equity reform, passed in the first session of 1852, have gone far to remove some of the principal abuses of the courts of equity. The Master in Chancery Abolition Act has, so far as new suits have been instituted, taken away no inconsiderable portion of the inconvenience, delay, and expense of Chancery proceedings, which, beyond all dispute, arose from the fact that "while the Master really conducted all the most important business of the suit, and, subject to appeal, decided the various questions which arose in its course, he yet possessed no judicial authority, and only derived his authority to inquire and report from the terms of the decree in each particular matter." The intention of the Act has not, however, been carried out to its full extent. The Masters, who have been continued for the purpose of completing the matters already pending before them, have not, to any appreciable extent, availed themselves of the peremptory powers given to them to summon parties before them, and to proceed, in the absence of parties summoned and neglecting to attend, to settle and wind up these matters. We believe that comparatively small progress has been made in these offices since November, and that, at the present rate, it will take years to finish the business pending at the close of the last vacation. It would certainly have been better, as the committee of the Law Association report, that the office of Master had been "entirely" and immediately abolished,

as the Chancery Commissioners recommended, "so that the present suitors might have the benefit of having the new system completely applied to the suits now in progress." Unless some steps are taken to know accurately the state of the references in the Masters' offices still incomplete, and unless direct orders are given to set the Masters and their clerks in motion independently of the parties, and thus to wind up all that remains of the old business, it may happen that the old suits will linger, and that old suitors will be kept out of their own funds long after the new suits have been completed, and the new suitors paid. Lord St. Leonards, when in Ireland, set himself to work to see what had become of the old suits, in which no proceeding had been taken for years, and he was the cause of finishing many. After he had taken the seals in England, he made like inquiries of the solicitors in the old suits here, and we have recently heard of the winding up of causes that had lived through two or three generations of men, and a whole cycle of lawyers. Something of the same kind might be done with the matters still sleeping in Southampton Buildings.

The courts have not very largely used the discretionary power of making specific references of mercantile and scientific matters to merchants, accountants, and others; and it will still take much more time to wind up a testator's affairs in Chancery, and to settle his debts, than it will do to wind up a living man's affairs in bankruptcy, and pay a dividend on the estate.

The Act for the Improvement of the Jurisdiction in Equity, and the Suitors' Relief Act for the Abolition of Fees and Regulations of Offices, have also proved very valuable; the seven sets of general orders in Chancery of 7th August, 7th September, 16th, 23rd, and 25th October, 10th November, and 3rd December, have been framed in the true spirit of the Legislature; they have not only considerably shortened the proceedings of the court, and materially decreased the expense, but they have modified the objections to the course of practice hitherto pursued at chambers; and the amount of the various stamps directed to be used instead of payment by fees, which are abolished, results in a considerable relief to the suitor.

The main evil of the equity courts—the delay,—however,

still exists, and will exist under the present arrangements. The mass of interlocutory applications made to the different courts on motions and petitions, and the hearing of short causes and claims, occupy so much of the public time, that original causes, ripe for hearing, advance very slowly to a decision, and further directions and costs have to wait an unreasonable time before they are disposed of. During Michaelmas Term and the subsequent sittings, at least two-thirds of the causes set down before Sir James Parker, and left to be heard by Vice-Chancellor Stuart, were left unheard. A special case, under Sir George Turner's Act, set down in the middle of July, pending a decision on which the parties most interested are without any funds for subsistence, stands in the middle of January more than twenty causes from a hearing, and at the past rate of progress the parties may not have a decision for two months more. When the Act for the improvement in the jurisdiction was before Parliament, an attempt was made to increase the number of the equity judges; and if the reform of the Ecclesiastical Courts to which we shall hereafter allude, shall proceed on the right principle, another equity judge will assuredly be required. Another cause of useless delay arises in the registrar's office. When a decision is pronounced in court, and a note of it has been taken by the registrar, the matter rests till some party, prosecuting the cause, puts the machine in motion, and bespeaks the minutes. This may be omitted to be done for weeks or months: a decree pronounced last July has not yet been passed and entered. The registrar does not act like the associate of a common law court, and make up the record forthwith; neither has he the power, or if he have the power, he does not exercise it, of drawing up the minutes, forcing the parties at once to give him the briefs and other facilities to enable him so to do. The minutes may be after some delay drawn; notice has to be given to the different solicitors to attend and settle; if one be absent, another notice has to be given; and when finally the minutes are, after much trouble and delay, settled, the briefs of all the parties, hostile or friendly, have to be produced and entered,—a proceeding of no ordinary difficulty in cases where interests are conflicting. Not unfrequently the court has to be

spoken to on the minutes; and ultimately the decree as pronounced is passed by the registrar, and duly entered. The poor suitors are under the delusion that when they have heard the decree, giving them possibly a distribution of the fund in court, they may soon be put into possession of their long-expected wealth; but though money orders, upon a pressure, have the preference in their turn with the registrars, the general delay is productive of much suffering and annoyance. So soon as an order or decree is pronounced, it ought to proceed in its regular turn, and without any further postponement, to be put into its effective shape.

The Common Law Procedure Act has brought additional business to the courts of Westminster Hall, the number of writs issued has increased, and the public are balancing the advantages of an effective, comparatively inexpensive, and moderately quick decision in the old courts, against the expense and difficulty of procuring payment after judgment obtained in the County Courts. But this Act has not received so much aid from the common law judges as the equity Acts received from the Lord Chancellor and his colleagues. From November till the first day of Hilary Term, the profession has been in constant expectation of a "series of rules for the regulation of the practice under the Act, and a scale of costs to be allowed;" and now that the rules have made their appearance, they cannot come into operation for four months; for they must be laid before Parliament for three months, and the time of their promulgation has been so contrived, that they have made their appearance just when Parliament has adjourned for a month. In the meantime the bill for the reform of the Irish common law courts has been introduced, and has met with such a favourable reception, that its success seems undoubted. It is apparently a mixture of the English Common Law Procedure Bill, of the late common law, and of the County Court system; it embraces much of the merits of all these, and it has been well remarked, that if "the bill becomes the law in Ireland, and is found to work well, it will probably be extended to the courts at Westminster." Since it is "a manifest evil to have different laws, or a different mode

of procedure, in different parts of the United Kingdom, becoming every year more and more closely united by the ties of an increasing trade; one result of which is, that almost every man engaged in business of any magnitude in either country is liable at any time to be involved in litigation on the other side of the Channel, and for that purpose has to apply to his attorney for advice and assistance." Thus the law will be again changed almost as soon as the new rules can be of any practical avail. In consolidating the rules of the three courts, and in issuing one uniform set for all, the judges are to be much commended; but the Law Association¹ complain, with good reason, of the mode in which the court fees have been settled. From the announcement of the Lord Chief Justice of the Queen's Bench they had inferred that, like the new payments, instead of fees, settled in the courts of equity, the common law judges had been settling a reduced scale of fees. Upon examining the proposed scale, it was found that although it contained fewer fees in number than the old scale, yet the amount to be collected was considerably increased; the abolished fees being those which were seldom paid, while those that are always paid were increased in number, and, in some cases, also in amount; "and the committee promise their exertions to procure such a revision as will make the scale really a relief to the suitor."

A far larger change in the law, however, is required by the country than is to be found in the mere improvement of the mode of administering the existing law in the different courts; and first and foremost among the required alterations is, what Mr. Bethell pointedly referred to—an amendment of the law of real property. Among all the suggested modes of giving relief to the owners of land there has been none mentioned which approaches in the smallest degree in importance and value the judicious and careful alteration of the very complicated, delay making, and expensive system of real property law in this country: and the trading and commercial classes, who live in their own houses in towns, or who invest their savings in purchases of land, are equally interested in a change of the law.

¹ Circular, No. III. Dec. 1852, p. 8.

The expedients they have resorted to in the freehold land societies, and in the building societies, have only more completely complicated the difficulties in the transfer of the soil, and we have doubts whether the Building Societies Act will not lead to more litigation, with reference to titles passing under the operation of the rules of these societies, than any other Act of recent times.¹ No one who has had to deal with titles affected by these societies can have failed to have seen how much the ordinary insecurity of landed property has been increased, and how much the expenses of future investigations will be enlarged. The law itself should be altered to meet all classes of transactions, whether they relate to a few roods covered with bricks and mortar, or to thousands of acres of the richest pasture, or the bleakest and poorest moor. There is no reason why the man who has money to invest in land, or the owner who has land which he wishes to sell or raise money upon, should be obliged to incur very heavy, and not unfrequently very uncertain, expenses, and to wait for weeks or months before the object can be obtained. The country-gentlemen who have had seats in Parliament have been the chief opponents of a sound reform. They

¹ It would be very desirable to have a return from the Registrar of friendly societies, containing his opinion of the operation of the law upon building societies, and of the evils inherent in them. The rules of no two societies precisely agree; indeed, they may be as various as the private opinions of each secretary. There is no common form of security; no common rule as to the right of the owners of shares to redeem; none of the ordinary incidents of a mortgage in the nature of the security; no mode of transferring that security to a subsequent incumbrancer, and avoid the effect of intermediate incumbrances; no method by which the books can be preserved, after the termination of the society, for the use of the subsequent purchasers; no permanent and accessible record to prove that the parties signing receipts which revest the legal estate in the proprietor of shares are, at the time of their so signing, the actual trustees; no check upon the inadequacy of the payments to meet the demands which may be hereafter made upon the funds; and none of those incidents of security or attempted security which the law has thrown around the parties investing money in friendly societies. These are some of the inconveniences already felt; and they will be soon multiplied, in consequence of the impetus given to the societies by the recent judgment of the Master of the Rolls, that building societies can invest the whole of their funds in the purchase of land, followed as that decision has, we understand, been by the opinion of Sir Fitzroy Kelly and Mr. Ogle, that when the land has been thus purchased with these funds, it may be distributed by lot among the shareholders, without rendering them liable to the Lottery Acts.

have fancied that the safe tenure of their broad acres would be in some mysterious manner endangered if a system, which has grown up from abuse to abuse, were touched in the slightest degree: Yet these same country-gentlemen must have had ample experience under the proceedings of the Inclosure Commissioners of the benefits of a cheap and ready mode of partitioning unenclosed lands, and of exchanging with their neighbours the fields that may be intermixed with adjoining estates: moreover, they must have noticed how short was the deed which the railways required for vesting in them the lands that took skin after skin of parchment when the property was conveyed to the landed gentlemen: and they must be convinced now that their ancestors, who in the time of the Henrys and the Edwards were satisfied with deeds of conveyance which were no larger than the palm of the hand, were quite as safe against adverse claimants as the men of the present day, who hold under a multiplication of deeds of wondrous numbers of folios in length, with an additional chance of error or mistake in every additional line.

The main objects to be obtained in dealing with real property are security of title and facility of transfer. Whatever prevents either of these essentials from being carried out militates against the protection and assistance which the law ought to afford to this species of property. Now it cannot be averred that the existing and most complicated system does give perfect security of title, and no one would venture to assert that it provides for facility of transfer. The most careful examination of abstracts, the most ample searches for judgments and other incumbrances, the most subtle requisitions of the most eminent counsel have failed to give security of title in many estates. To such a length have objections been multiplied that it has been long proclaimed to be almost impossible to find what would be deemed, on strict investigation, a "marketable title." Hence have arisen the many restrictions upon the requirements of purchasers which are to be found in all modern conditions of sale, and which certainly do not increase the market value of the property submitted to competition; whilst disputes of much fierceness not unfrequently attend the settling of agreements for purchase by private contract.

In such a state of entanglement were the titles to real property in Ireland involved, and so inextricable were the difficulties, that when the Incumbered Estates Act passed, a parliamentary title was given to the purchasers, and henceforth the title will start from the purchase under the court. Long abstracts, and still longer examinations and recitals, will be rendered worthless for some years at least. The law of real property in Ireland did not materially differ from the law in England and Wales; and it has been suggested that something like the same provision of a parliamentary title should be given in this country to all property sold under the directions of the Court of Chancery. The suggestion deserves much consideration, although we will not now stop to discuss at length its merits or the objections. It is perfectly well known that purchasers under decrees of the Court of Chancery in England do even now believe that there is some magic in the matter, and that somehow or other, by some mode or another, and by some person or another, a purchase under the Court of Chancery is more safe than a purchase made in the ordinary way. It is a popular fallacy now, but it may with ease be converted into a reality; and seeing the number of real estates that, under directions for sale in wills, or for the payment of a testator's debts, or upon mortgage securities, are and will be dealt with by the courts of equity, such a provision would be found in a few years to be of extensive operation. Nor need there be any sound apprehension that the rights of the proper owners would be improperly dealt with, since the Lord Chancellor has, under the provisions of the recent Act, appointed some of the most eminent conveying counsel to investigate titles and settle conveyances; it would not be more difficult to obtain their certificates to the propriety of selling a real estate with a parliamentary title, than there is in procuring the opinion of the judges upon the title coming before Parliament to be dealt with by an Estate Act; and as the estate sold with such an advantage would produce its fullest value, the whole interest of adverse claimants might be settled in dealing with the money produced by the sale, and paid into court. We know that the system has worked well in Ireland; we know how careful has been the chief commissioner,

who is a very able real property lawyer, to see that the title has been sufficiently stated to the court to stop any flagrant injustice: and we believe that a report might be procured from him which would be very interesting, and might be turned to good account.

For one indispensable change, however, the public are fully prepared. They have made up their minds that the first step to be taken to insure security of title and facility of transfer, is to establish a *general register* of title-deeds, with proper indexes, and free from the expense and annoyance caused by the registers already existing in Middlesex and Yorkshire. The second report of the Real Property Commissioners dealt most amply with this branch of reform twenty years ago. It is almost impossible to add anything to the evidence they collected, or to the recommendations they made thereupon. If this reform had been at that time pressed with vigour, and yet with discrimination, we might have been reaping at this day great practical benefits from the researches which were carried on with so much zeal and ability. The favourable time was, however, lost, and we have been for fifteen years occupied with party squabbles, and with financial alterations, which have postponed the amendment of the law. The efforts of Master Wm. Brougham, whilst member for Southwark, and more recently of Lord Campbell, to carry a Registration of Assurances Bill, have been rather prejudicial than otherwise; for they have raised all the objections which could be started against their proposal, and have not been able to dispose of them, or to meet them, as would have done the members of a Government introducing the change with the weight of their authority and on their collective responsibility. Many useful changes have been made by the efforts of individual members of either House, but so vast an alteration could hardly be expected to be carried by individual exertion.

In all civilised countries the title to land depends upon written documents, and proof of the seller's right, beyond the mere fact of the possession of the land, is required by the purchaser; and it is a necessary consequence that means should be

afforded by the law for the manifestation of all the documents requisite to complete the title, and to protect the purchasers against the effect of any documents not brought to their knowledge. At present nothing of the kind can be accomplished, except with reference to copyhold property, where the transfers are recorded on the Court rolls, clearly, concisely, and effectively. But even with respect to copyholds the advantages will very soon be lost by the general enfranchisement of that species of estates. With regard to all fee-simple and leasehold estates the evils of ages have been accumulated; not only does an intended mortgagee or purchaser know nothing of the perfectness of the abstract submitted to his conveyancer, but, in the case of large properties sold off in lots, or for building purposes, the most troublesome and clumsy expedients must be resorted to that some of the objects of registration may be attained. Take, for instance, the large and populous town of Brighton—the greater portion of the eastern division is built upon the Kemp estate; the largest part in bulk of that estate is under a marriage settlement, and could not now be used for building purposes; but the separation between that which could and that which could not be built upon, is only to be found in an ancient bridle-road running along a line of land at the foot of the declivity of the Downs, so that in times to come, when the roadway shall be lost, as it is almost now, reference will have to be made to an old map in private custody, and never authenticated as perpetual evidence. To make themselves secure, the purchasers have had memoranda of their purchases indorsed on the original settlement and conveyance to Mr. Kemp and his trustees. The space has become valuable enough to be charged for by the square inch; it has been, or will soon be, exhausted; and even now those who have to deal with the property are sadly puzzled, amidst the hundreds of memoranda, to know whether any, or which, of them relate to the particular portion about to be dealt with. And this brings us to the notice of another serious evil in the existing system. Very many persons in the course of years have become interested in the same deeds, and there is great trouble and expense in obtaining their production; add to all this the constant danger of loss by fire or accident, and the ad-

ditional danger of the forging or substitution of deeds, or of the concealment of rights, and we have the strongest grounds for believing that a general registry will not long be kept from us.

In forming, however, that general registry, care must be taken that the index is capable of easy reference. It will not do to have to search under the surname alone, of which, in one year in Middlesex, there are many hundred entries; but the parish and the particular estate ought to appear patent on the face of the index. When the commissioners presented their report, they thought that indexes to particular estates were objectionable, because, in order to frame them in an adequate manner, a general map or ground plan of the entire country would be required. What was an objection in 1832, has now nearly ceased to be so. Under the Tithe Commutation Act, a map, or ground plan, of every agricultural or rural parish has been made or adopted, it is deposited in the parochial chest, and is of constant and easy reference. True it is, that old maps have been, in some instances adopted, at the request of the landowners, by the Tithe Commissioners, and the latest changes have not been marked upon them; nevertheless, they are sufficiently full for all practical purposes, and the copies in the parishes, and the duplicates in the Tithe-office in London, are in constant request on the transfer of land. A system can be devised, that will be free from the mischiefs of the existing registries, which we agree in thinking "to be worse than useless," and which, in addition to the expense and uncertainty of accurate search, raise innumerable and very complex questions of actual and constructive notice. Upon the best mode of giving local practitioners the benefits of a county or local registration, in addition to the common advantages of a general register in the metropolis, we shall offer a few words by and by.

We take it, then, that one of the promised reforms must be a general system of registration of all deeds on a carefully digested system, one which will be at once simple and cheap; and for that end, that the smallest possible expense shall be made to fall on small transactions.

A system of registration, patent to all parties interested, and of easy reference, must be a necessary preliminary to a proposal for the shortening of abstracts, and for the greater security of titles, which has, we believe, found considerable favour in a high quarter, and may be proposed to the Legislature. The suggestion is, that all titles might be simplified by giving to every conveyance of the fee the same incidents and the same effect as was given in former days by a fine : and thus to bind the *parties*, who would be barred of any latent right they might have had ; the *privies*, or those in any way related to the parties, and claim under them by any right of blood or other right of representation ; and *strangers*, that is, "all other persons in the world, except only parties and privies," who were also bound, "unless within five years after proclamation made, they interposed their claim, provided they were under no legal impediments, and had then a present interest in the estate ;" the impediments being coverture, infancy, imprisonment, insanity, and absence beyond sea, in which cases the persons thus incapacitated from prosecuting their claims had five years allowed them to put in those claims after such impediments were removed. Persons who had not a present, but a future interest only, had five years to claim in after their right accrued ; "and, if within that time they neglected to claim, or if they did not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever were barred of whatever right they might have, by force of the statute of non-claim." Now, publicity is the essence of such a change in the law, and of thus virtually limiting actions relative to real property to five years, instead of the present period allowed by law. The proposal is an obvious improvement upon the rule now existing, and if applied under restrictions framed with ordinary care, it may be productive of good, although its novelty in practice will possibly raise many objectors, and many objections, which must be met and satisfactorily answered. Notoriety was a requisite of the oldest form of conveyance, the feoffment, followed by the necessary livery of seisin ; this oldest form of conveyance has been superseded by the requirements of a new state of society and the altered circumstances

of the times. There is, however, no reason why some of the advantages of livery of seisin should not be obtained or recovered by another mode ; why, in fact, there should not be a registration sufficiently plain and accessible to supply the defect of the former public and notorious act, by which the country might take notice of and testify the transfer of the estate ; and such as claimed title by other means might know against whom to bring their actions. Security of title will be assuredly increased by the adoption of such a limitation, and it does not seem to us that the legitimate interests of any parties will be materially compromised. It is obvious, that something is demanded for the simplification of dealings in land ; and a return to the incidents of an old and heretofore well-known rule (avoiding the direful expense of the old system), may be one of the safest modes of adopting the existing system of conveyancing to the wants of the day. Add to this an enactment that the use of certain stated words in the operative part of a deed, shall imply certain qualified or unqualified covenants, at the option of the parties, and it will become possible once more to examine a title, and frame a conveyance or a lease within a reasonable time, at a reasonable length, and at a moderate cost.

Another reform, upon which men's minds have been thoroughly made up, and which all parties and all sections agree in demanding at the hands of the government of the day, is a different mode of granting probates of wills and administrations ; and we may perhaps add, a general reform of the law as regards divorce, and many other matters of no great frequency now-a-days ; and a direct change in the administration of the Admiralty Courts.

The question of improving the mode of proving wills and granting administration, was referred by the late government to a new commission, not, perhaps, with the intention of examining and reporting on the whole subject, but of devising some plain and intelligible rule by which compensation may be given to the various vested interests which will be affected more or less by any change in the system. It can never be intended that the new commissioners should inquire afresh into the propriety of

retaining the 372 courts (286 of which are in the province of Canterbury, and the remaining eighty-six are in the province of York), which have now the power of granting probate; or into the correctness of obliging two or more grants to be taken out where a small portion of property lies out of the jurisdiction of the particular court which has granted the probate—an evil aggravated largely since the introduction of railways, and the existence of their stock in both provinces of England, and also in Ireland; or into the disadvantage of having two portions of the same will decided upon by distinct tribunals differing in their rules of construction, in their mode of taking and estimating evidence, and in most of the essentials of coming to a decision, or of administering the law: it cannot be necessary at this period of the nineteenth century, to inquire whether different tribunals ought to have the power of determining that the same instrument shall be valid to pass money and funds and leaseholds to any amount, and shall not be valid to pass a quarter of an acre of freehold land. These things cannot be within the scope of the pending inquiry; they have been dealt with and reported on years since by two commissions—one the Ecclesiastical Commission in 1830, and the other the Real Property Commissioners, in their fourth report. These reports have exhausted the subject of the objections, though the suggested remedies somewhat differ.

It will, however, be worth while to look a little more closely into what has been already reported on, and into the strange vacillation of the Legislature, which (after such reports, and after the loud complaints of mercantile men, and men of landed property) has allowed the evil to continue, and the anomaly to be unredressed.

The Ecclesiastical Commissioners, of whom several were bishops and judges, after recommending the transfer of the whole *contentious* jurisdiction from the Diocesan Courts to the Provincial Courts, go on to describe very faithfully the mischief of the law which requires a double probate for property in distinct provinces of the same country. They say:—¹

“The law on the subject of *bona notabilia*, is extremely compli-

¹ Report, p. 23.

cated and ill defined; but we do not deem it necessary to enter into any minute discussion of the principles on which it is founded, nor the decisions which have occurred. It is sufficient to say, that in all cases where probate or administration is taken out in any court within the province of Canterbury, except from the Prerogative Court, or perhaps a royal peculiar, and in some cases other peculiars, if it should afterwards appear that the deceased died possessed of *bona notabilia* within another jurisdiction, the probate or administration is null and void. *Bona notabilia* are said to be constituted by the possession of personal property to the amount of £5 in another jurisdiction. In some of the older cases there are many nice discussions as to the amount and mode by which the *bona notabilia* shall be determined; but the general rule is sufficiently illustrative of the existing state of the law. The same observations apply to the province of York. Where there is personal estate in both provinces, there must always be two probates or grants of administration."

They go on to declare very emphatically:—

"We are strongly impressed with the difficulties and inconveniences attending the present state of the law relating to *bona notabilia*, and the mistakes and frauds likely to occur in regard to such questions, which arise entirely from the distinctions of jurisdictions. We perceive, too, how easily and how frequently it may happen, even where great diligence is used to ascertain the exact state of the property, that debts and personal effects of various descriptions may exist in another jurisdiction, and yet escape all notice until after the probate or administration has been obtained. The consequence, also, of the probate or grant being null and void, must, under all circumstances, be productive of expense, delay, and difficulty; and in some instances the damage sustained may occasion very great inconvenience or detriment."

Similar considerations apply to the archidiaconal courts; and also to the manorial courts, which exercise a testamentary jurisdiction. These last are only forty-eight in all, and the right is of little or no advantage to the lords of manors. The Ecclesiastical Commissioners also treat well of another evil:—¹

"There exist no direct means applicable to all cases, of obtaining a final determination on the validity of a will devising real estates; in some cases litigation may proceed to a vexatious extent before any remedy can be applied: and the jurisdiction exercised by the Court of Chancery is not an original jurisdiction to determine, or cause to be determined, the validity of a will, but its functions can only be called into exercise from the existence of a trust, or some collateral matter of which it has cognizance. Whilst the validity of a title thus remains undecided, it appears obvious that inconvenience must ensue,

¹ Report, p. 27.

for there must be difficulty in disposing of the property by sale, or charging it with encumbrances, and those having an interest therein cannot with security settle their affairs for the benefit of their family and connexions."

They report their opinion¹ that—

"The validity of wills disposing of real and personal estate, or either, should be determined by trial in one and the same court, and the probate made final and conclusive evidence of title to real and personal estate."

And they think that—

"By thus rendering the judgment of a competent court unappealed from, or a judgment of a court of appeal on the merits, after proper warning given to all who have an immediate interest, final and conclusive, in all courts, of the right to real estate, additional security will be afforded to titles to real property, and some delay, doubt, litigation, and expense avoided."

Of course introducing *vivd voce* evidence in the case of a will of personal as well as of real estate.

When the Ecclesiastical Commissioners apply themselves to remedy these mischiefs, as well as to remove other inconveniences, they avow² that they—

"Are unable, after most careful consideration of the whole subject, to devise any measure so effectual and likely to be productive of so much convenience and advantage to the public, as that of transferring the whole testamentary jurisdiction and the exclusive rights of granting probates and administrations to" [What do our readers suppose? to one court of probate of course. Oh! no! but] "the archiepiscopal courts of the respective provinces;" one of such provinces (Canterbury) then embracing twenty-two dioceses, and the other (York) four dioceses, besides that of Sodor and Man. Although they close their report by expressing their own doubts as to the expediency of continuing the provincial jurisdiction of York, they 'do not venture to offer a specific recommendation on this head.'"

And they thus enumerate the advantages of their proposed reform³:—

"By this measure the uncertainty as to the validity of grants, and the insufficient custody of testamentary documents, will be altogether (?) removed; increased facility will be afforded for the examination of wills and administrations, and the discovery of personal representatives." * * * "Patronage will be in some cases abolished, and in others diminished; but as all patronage is a trust for the benefit of the public, the loss of it will be cheerfully!! submitted to, when arising from improvements materially conducive to the public advantage!!!"

¹ Report, p. 31.

² Ibid. p. 73.

³ Ibid. p. 24.

The result has not exactly answered these sanguine expectations of the sacrifice of patronage on the altar of the country. The Law Association pointedly state that the "great difficulty arises from the immense amount of vested interest and patronage that must be interfered with by any adequate reform." It remains to be seen whether it is practicable, we know it is "*possible*," by a "careful system of compensation to do substantial justice to all parties." And the society goes far enough to declare that "certainly the most extravagant compensations that could be thought of"—they seem to have lost sight of the Six Clerks' Office abolition, and the compensation to the six clerks and their widows—"would leave a very large margin of gain to the public, by the abolition of the present system, which is burthensome to the public, without being remunerative to any portion of the legal profession, except the very small class who possess the monopoly of practice in the courts."

Nor is this all. The matter was again fully considered by the Real Property Commissioners in 1833: the evils were not less in their view than in the opinion of their brother commissioners. They report¹ that—

"Serious evils are occasioned by the existence of the numerous jurisdictions described, in addition to the inconvenience arising from the frequent necessity of obtaining several probates of the same will. The number of the courts, and the extent and nature of the jurisdiction of many of them, cannot be ascertained; the right to some is contested between the superior and inferior, and between spiritual and lay parties. Many of them have not hesitated to grant probate of any wills which have been brought to them, without troubling themselves to inquire whether they were usurping a jurisdiction which did not belong to them. There is no uniformity in the practice or rules by which the various courts are governed. Many of them are without competent judges and officers for the due administration of justice; a few have secure places for the custody of the important documents which they compel parties to deposit, and in many of them such documents have not been preserved, except within a late period."

These inconveniences cause expense and delay in the transfer of real property, and the existence of the evils being known to the Ecclesiastical Courts, they have tried, but without success, to apply a remedy. There is no doubt, say these commissioners,

¹ Fourth Report, p. 53.

that the laws relating to the proof of wills should be rendered uniform; and as the evils of the courts of probate have been, for half a century at least, generally acknowledged, it has become the prevailing opinion that, if the system of granting probate is to be retained, "there should exist only one court of probate for the whole of England and Wales." The Real Property Commissioners refer to the advocacy of a retention of the diocesan courts, "on account of the facility thereby afforded to persons resident in different parts of the country, who may wish to see the wills of their relations;" but, upon the whole, they think the greater general convenience would be obtained by the abolition of all district jurisdictions whatsoever.

With one central court of probate, however, it might become necessary to extend the practice of probate to wills of real property, and to give to the court, concurrently with the courts of equity, a general jurisdiction over all testamentary causes, including suits for the administration of the estates of testators, and for the recovery of legacies. Against the proposal to extend probate in its common form to real property, the commissioners point out many and serious objections; and, indeed, with reference to real property, a probate in the common mode of obtaining it will give no better security for its validity than a mere registration. And by attributing to registration the effect of probate in common form, the Legislature would do all that seemed to the commissioners to be required for the convenience and protection of an executor, and of creditors and debtors. Whilst on the suggestion of giving a concurrent jurisdiction, the commissioners show that, to make it efficient, there must be, 1st, the same laws; 2nd, the same forms; 3rd, the same powers; and 4th, the same appeal: and the spiritual courts differ from the courts of equity in all these particulars.

If all the objections to an entirely new court were removed, it would only be in fact a new court of equity, and as the existing courts of equity are able to dispose of all the testamentary business, these commissioners think that the public utility will be better served by using the existing tribunals than by creating a new one. And the Real Property Commissioners thereupon proposed that "probate of wills should be discontinued,

and the whole testamentary jurisdiction of the spiritual courts, contentious and voluntary, abolished;" that the will should be registered, subject to a caveat being entered; an office copy being delivered to the executor, which should be conclusive evidence of the title of the executor, unless the will should be declared invalid by decree of a court of equity; and that such court should have original jurisdiction over wills of personalty as well as of realty, and should be authorised to "entertain a suit, either by the executors, or by any legatee claiming under the will, to have it established, or to have its trusts carried into effect;" or "by any person claiming adversely to the will to have it declared void."

It is not easy to ascertain in what manner the probate of wills became the subject of ecclesiastical cognizance; it has so been since the time of Edward I., or earlier; and here we mark the results. The evils have been most clearly pointed out, and, as we have seen, two remedies have been suggested by those most competent to form a judgment: the first proposal is to have one court of probate; the second, a general registration of all wills, with a transfer of all questions arising upon them to the courts of equity. The first proposal has found most favour with the Legislature, and has formed the groundwork of some abortive attempts at Legislation. In 1835 a bill was brought before the Commons to consolidate these courts, but it was not carried to the Lords. They, in their turn, had before them, in 1843, a bill "to carry into effect, with some modifications, the report of the Ecclesiastical Commissioners;" this bill was referred to a select committee, who considered very attentively the claims of some objectors, who desired to retain the diocesan courts; but, after a close examination of the matter, the committee decided, with the Ecclesiastical and Real Property Commissioners, against keeping up a separate court in each diocese; and in favour of one court of probate: they met, however, the complaint of the local men by recommending that a copy of each will should be remitted to the diocese for facility of search and inspection. Still no Act passed. In 1844 another bill was before the Commons, and nothing effective was done. In 1845 Lord Cottenham, against the remonstrances of the bishop of

Exeter, and under the recorded protest of the bishop of Salisbury, carried through the Lords a bill to found a new court of probate: that bill never met with the concurrence of the lower House: the subject dropped, to be renewed after another interval of seven years, with something like a hope of success.

The question is still open, whether a single court of probate should be created, or whether full and sufficient use may not be more appropriately made of existing courts. The objections to a new court of probate, unless it be in effect another court of equity, were well stated by the Real Property Commissioners, and remain to this day wholly unanswered. Moreover, it is a great disadvantage to the public to have a multiplication of distinct courts to decide separately and apart the same questions, which existing courts can and do deal with. We all remember the celebrated plan of making a separate court for the decision of bankruptcy cases, with its chief judge, its puisne judges, and all the paraphernalia of a distinct tribunal, and how it fell to the ground as being expensive and needless, and how Vice-Chancellor Knight Bruce subsequently sat in bankruptcy on a Wednesday morning only, and how he usually disposed of the whole business by noon. Experience ought to teach us also how troublesome it is to confine all the questions which are to be heard on any particular branch of the law to one court. The Common Pleas was supposed to be a great, perhaps the only, court for a particular branch of the law, and yet that branch is adjudicated upon equally by the other courts. It is admitted that the appointment of another judge in equity would be of advantage in keeping down arrears; and if, instead of founding a new court of probate, the whole matter were referred to the equity courts, we believe that the best practicable remedy would be found. The labour of the judge in the Ecclesiastical Court at Doctors' Commons does not appear overwhelming, and assuredly does not lead us to the conclusion that disputed rights to probate, and arguments as to the validity of the execution of wills, would occupy one-half of the usual daily sittings of a court of equity, and it would be obviously advantageous to have the remainder of the judges' time available for other matters on which he is fitted to decide.

For these reasons we are strongly impressed with the opinion, that the true remedy is not to be found in a separate and new court of probate, with an appeal to the Queen in counsel, but in the transfer of the questions on probates; on the construction of wills; on the payment of legacies; and on the proper administration of the testator's assets to the courts of equity, in all cases where the amount involved exceeds a certain sum. But we would avoid the objections of expense and also of delay, by transferring the right of granting probate and administration, and of settling all questions involved in estates of small amount, to the judges of the County Courts. They sit and act on the spot: their courts are of easy access to the bulk of the executors and devisees; they may be, and in most cases are, presided over by men of competent legal knowledge; and there would be great facility of putting them in motion for small matters. Few there are who have not felt the trouble of bringing an unwilling executor to account; and if it were a rule, that all executors should render an account to the district court, or to the general court, within some twelve months, an undoubted advantage would be gained. Of course, it would be necessary under such an arrangement as we suggest, to allow to any party aggrieved a right of appeal, giving security for costs, from the local tribunal to the judge in equity; or to allow the local judge, if he shall feel great difficulty upon any point, to submit the case on his written statement for the opinion of the higher court. Moreover, the judges of the County Courts, and their clerks, who are now distributed over the different parts of the country, and are to be found in most of the towns, might be made available for taking the preliminary proofs from executors of all wills to be registered, and for transmitting them to the chief place of registration. A known public officer, directly responsible to his superior, would be far preferable to the occasional and almost irresponsible employment of a surrogate. The initiative in all cases might be taken by these officers of public and known courts; and the adjudication in estates of small amount only might be left to the local tribunal.

The question of compelling executors to render and pass their accounts (for which in the case of administrations the

Ecclesiastical Courts take a bond, practically useless from the deficiency of the power of the court itself to take the accounts of the testator's estates), will, under an amended system, force itself more prominently upon the notice of all parties: some efficient remedy will be demanded, and must be had. It may be very doubtful, whether it will not be proper to nominate, in all cases where it may be demanded, some public administrator to superintend and see to the good management of a testator's estate. This officer exists in our East-India possessions, and in several of our colonies: the principle of some such appointment in matters arising out of the realization and administration of estates in bankruptcy, has been recognised in our own land: and when the public attention has been more directed to this part of the general subject, it may be that the public will require the services of some such public officer.

To apply ourselves to the objection which has been raised alike to a general registration of deeds and of wills in the metropolis, because it will deprive parties near their own homes, and country legal practitioners, of the ready means of local knowledge and investigation—let us say at once, that there is considerable force in the objection; and if it could not be satisfactorily and cheaply met, we should certainly agree in the proposal for several local registries, rather than for one central registry. We do not underrate the expense, the trouble, the delay, and the unsatisfactory nature of searches made in the metropolis by the clerks of the London agency offices, many of them very young men only passing into the profession, and not frequently capable, by previous professional knowledge, of appreciating the niceties required in conveyancing, or in dealing with real property. The objection may be most satisfactorily met by the local registry of a certified copy of each deed and will: and to make these easy of reference for all parties, we would suggest, that in every county which for the purposes of the Reform Act has been divided, there should be a separate place of deposit and reference for each division; and that for the purposes of convenient access, such place of deposit should be one of the towns in which the county sessions are held; or, in the case of large

towns, like Liverpool or Manchester, or corporate towns, that they should be selected. We mention these separate sets of offices for separate divisions of counties, because in many the communication (since the prevalence of railways) is less direct between the two divisions of the same county, than between the chief places in the county and the metropolis; and if the expense of a duplicate or copy is to be incurred, the local search ought to be facilitated in every practicable way. We may be met with a statement of the additional expense to be caused by these certified copies. We can show, however, that they will be but nominal. In the case of wills, the copies for local deposit need not cost sixpence. Already official copies are made and transmitted to the Legacy Duty office: the contents are there abstracted into the office-books for the purpose of levying the duty; the copies of the wills are then, or if properly abstracted, ought to be useful no longer to the tax receiving-office. These same copies, without any additional expense, may be transmitted to the local registrar. With reference to deeds, the matter will not be equally free from cost, but a small fee of twopence a folio for the official copy would amply pay the expenses of the office in making it, and would be but a small tax on parties, compared with the benefits they would derive from the improved system. Where deeds relate to lands in different counties, or to lands in different divisions of a county, these copies need not be multiplied; a registration of one copy in the division where the bulk of the property lies, and a reference to it elsewhere would be sufficient. In nine out of ten of such cases the searches would be made directly at the central office. We would thus, at a trifling outlay, secure the advantages alike of a local and of a central registry of wills and deeds, in the same offices; subject to the same control, and open with the same ease of search and extract.

Having provided a substitution for the present courts of probate, the question will arise, what is to be done with the original wills already proved? The Real Property Commissioners would have them removed to the general registry-office, and there preserved. They understate the loss already incurred in the local courts of probate, and the still greater probability of

loss in times to come ; yet we are not disposed to agree entirely in their recommendation. The wills to which most frequent reference is made, are those which have been proved within the preceding half century : wills beyond that date are little looked at with reference to personal, and not very often with reference to real property : wills, within the half-century, are in frequent request. The old wills become, however, extremely valuable for all general historical purposes, and for elucidating family and local history. The habits and manners of the people of the past, are learned by reference to their testamentary dispositions ; and just as the wills cease to be of individual or personal, they become of historical or general interest. We would make a distinction between the two classes : we would not remove to one central deposit all the local wills of the last fifty years, as there will be no copies for local reference or deposit, but we would transfer the wills to the local registries, to be handed over gradually at periods of some ten years each, when the half-century has expired. The Canterbury wills of the last fifty years we would hand over to the central registry-office. We would deal very differently with the older wills ; we would treat them like the other great records of our country—the richest fund of historical information now existing in any country—are treated ; like the records of our common law courts are dealt with ; like the old fines and recoveries were dealt with : we would have them deposited with the Master of the Rolls, the keeper of the public records ; and left open, as those records are, under his direction, to the most ready and perfect inspection for historical and literary purposes ; and also for all professional searches. The old inquisitions *post mortem*, are preserved in these repositories ; there is no reason why the later evidences, akin to them and of similar interest, should not also be kept with them. At present, the historian or the literary student is virtually debarred, by the expense and trouble, from the use of these most valuable aids to history—the wills. In the Prerogative Office of Canterbury, the depository is in an office not belonging to the public, but to the registrars, of whom it is held on lease. In 1829 it had become too small for the continued accumulation of wills ; and it was enlarged at the

registrar's expense, after an amusing correspondence with Sir Robert Peel, who thought that fees to the amount of 7,000*l.* a year, imposed upon "one Mr. Moore" the onerous duty, at his own, and not at the public expense, of providing a safe place of deposit for the instruments on which those fees had been paid. Years have passed, and the want of space is again felt. Any one who has had the necessity of making searches for professional purposes, must have found by sad experience how little room there is: the literary man finds yet more difficulty in the older wills, and in the peculiar courtesy of those who cannot often read the very instruments they have to produce. Add to this the enormous expense of searches and office copies, and the restrictions imposed in the office, which prevent the taking of any extracts, except the date of the will and the names of the executors, and which will not allow the comparison of any abstract or of any other than a certified office copy: and we have an accumulation of inconvenience which amounts to a prohibition upon men engaged in literary pursuits. The transcripts of wills in Doctors' Commons commence in 1383; the original wills, in October 1484, but without any complete series, or with many chasms, from March 1497 to 1660; their present value for titles being *nil*, they are, nevertheless, kept from the only use of which they could be made for public purposes. The Camden Society brought the subject before the late Archbishop of Canterbury, and again before the present Archbishop. Their Graces had no power to interfere; the society sought and had an interview with the registrars, still without success; and the Council have now memorialized the new commissioners. The Master of the Rolls, with the aid of Sir Francis Palgrave, has, under some very judicious restrictions, admitted literary men to the free use of the historical stores in his custody; and when the wills up to 1800 shall be deposited with him, they will be accessible for all legitimate purposes.

We may conclude that the time has come when the many Ecclesiastical Courts will no longer be required for the purposes of probate: may not their services be equally well dispensed with in many other matters which they now deal with? Is it necessary that they should be required to settle delicate ques-

tions of matrimonial strife, that must also come before a common-law court if the ultimate remedy of divorce is to be obtained? Lord Brougham has indeed on the stocks a bill for amending the law of divorce, and this will force itself upon the Legislature. What is the use nowadays of the punishment of penance for defamation of character? What is now the dread by laymen of the once fearful sentence of excommunication? Are not the ordinary civil tribunals sufficient to punish brawling in the church when they can punish brawling in the streets? Cannot the ordinary courts decide questions of dilapidations? And is it necessary to continue the last lingering remains of suits for tithes now nearly exploded in the Ecclesiastical Courts? To these courts may be preserved all questions of church discipline and all matters of church government, which may be remitted to them; in all greater civil matters the wants of the times have outgrown them.

The Admiralty Courts, too, are largely complained of at Liverpool, at Plymouth, and in many other of the large mercantile towns. Matters of small moment cost very large sums, and the place of decision is far removed from the residence of the interested parties. Here again reform is needed, and will have to be considered by the government.

And this brings us to a very important consideration: whether the County Courts could not be rendered efficient for many more important purposes than they now perform, or than the existing judges of those courts could, under their present amount of labour, be expected to carry out. The history of the forcible and hasty, instead of the well-considered and deliberate, establishment of these courts, the jealousy with which they were looked upon by the Legislature and the superior courts, and the excess of eagerness on the people's part to avail themselves of justice, however administered, or however imperfect, provided only that it were brought to their own doors, are not subjects for creditable reflection. There is no reason, however, why prejudices should not now wear off, or why the system of local tribunals properly supervised should not be carried far nearer to perfection. There is no sound reason why, under proper re-

strictions at the option of all parties interested, these should not be made the primary courts in this country for most law proceedings. We have already pointed out some of the additional uses which may be made of them. They do now, in practice, decide questions involving large amounts and of complicated law, although nominally they are confined to amounts of £50. For instance, a right to claim a few pounds by a dock company for unloading a vessel in the centre of the dock, and not at a wharf, may involve the loss of some hundreds a year to the company, and does include no very easy construction of the terms of an Act of Parliament; yet the matter must be decided in the County Court, and being under £20, neither of the parties can appeal to a higher tribunal, nor can the judge, who might like his judgment to be tested by others, send a case to the superior courts. There are hundreds of like instances, and there are the converse cases of men suing on an undisputed bill of exchange sent to the courts at Westminster, or to the county assizes, because, though there is not a particle of law involved in the decision, the County Court judge can try nothing over his limited amount. A very jealous and painstaking committee of the County Court judges was formed to consider and settle the practice and the fees; and we can see little reason for not calling for their advice on the best mode of extending the usefulness and remedying the defects of their courts. Their opinion was asked on the operation of the law enabling parties to be examined in their own cases; that opinion was almost unanimous in its favour: the Law of Evidence Bill passed, and the judges in the superior courts, many of whom were very doubtful of the propriety of that change, now coincide with those who had before very good means of judgment, and approve of it. In like manner may the experience of the local judges afford valuable aid upon still pending questions of law reform.

One other matter was promised the consideration of the last government, and ought not to be allowed to escape the notice of the new men—a Digest of the criminal law. The inquiries into that branch of the law have been in progress for years, at an expense to the country of nearly a quarter of a million of

money. Up to this time the reports have fallen lifeless upon the Legislature; it is time that they should receive some vitality. So much of the subject as relates to crimes and punishment is ripe for legislation, and may now be embodied in an Act of the Legislature. The portion having reference to procedure is not in a stage so advanced: further inquiry must be made, for further information is required; but there is no cause for a long delay even in this branch.

There are also other inquiries on foot, which ought by this time to be advancing towards completion. The Chancery Commissioners promised us a further report, and now that their first recommendations have been adopted, and have received the sanction of practical men, the commissioners may well proceed to complete the duties committed to them.

We have every reason to hope also that a ready mode of dealing with the abuses of small charities, and of appointing new or changing old trustees, will be submitted to Parliament, and will at length meet with the concurrence of both Houses. The many thousands of pounds which have been spent in setting old and large charities in order, have pressed very heavily upon the funds to be administered; and the expenses now necessary are prohibitory in all charities of small amount. Session after session has this subject been mooted; though years roll on and sessions pass by, party considerations or official inaptness have prevented the application of any remedy to a long-admitted grievance; and these abuses of old charities are permitted to remain as an illustration probably of the declaration that, "what subsists to-day by violence, is perpetuated to-morrow by tradition, till the hoary abuse shakes its gray hairs at us and gives itself out as the wisdom of ages."

The enumeration we have made of the most pressing *desiderata* of law reform may have exhausted our readers, though they have by no means exhausted the subject. We have mentioned the reforms that appear to us to be most pressing, and to be most fit, from the completeness of prior investigations and inquiries, for immediate legislation. The absence of much old party asperity; the admission of law reform as a common field

on which all parties may meet and may all reap common rewards; the temper of the people, which leads rather to practical than to great organic changes; the conversion, or perhaps the adhesion, to this cause of many who have opposed all change; the competence of the men occupying high judicial places; the undisguised approbation of what has been already done; all circumstances and all persons combine to make the present a season for settling with care and attention the questions that have been long agitated in the profession and among the public. Rash changes are to be avoided, and at the same time the rust which has stopped or impeded the working of the machinery must be removed; and new forms must be used to accomplish the same work, which cannot be longer performed efficiently by any old process. To conserve, and at the same time to reform, is the motto of the government of the day, and we are not without some confidence that they will act up to it in spirit and in truth.

W. D. C.

Since the above was printed, we have had reason to hope, *and more than to hope*, that the government intend to bring in measures for the fusion of certain jurisdictions; for the codification of the laws; for legal education; for reform of the Ecclesiastical Courts; and for improving the drawing up of statutes.—EDITOR.

ART. V.—COMMISSIONS, COMMISSIONERS, AND THE BAR.

EVERY part of nature's dominion is mutable. Man is continually changing: everything about him is in a state of visible mutability. Fashions proverbially change; habits change;

customs of every kind change ; in fact, change and modification are incidental to the condition of the world in which we live. It is, therefore, quite chimerical to imagine that any social system can be devised that will invariably continue perfect in all its parts, and applicable in all its bearings. The customs and practices of a former generation would be incongruous and unbearable in this. In 1700, the population of England and Wales amounted to something more than 5,000,000 ; at present the inhabitants of these parts of the kingdom amount to nearly 16,000,000. Unquestionably, this trebling of the population must have produced causes for some alteration in our social and political arrangements. From these and other kindred considerations, it is obvious, that as time moves on, systems must be remodelled, and institutions revived. From time to time, considerable alterations must be made in many parts of the constitution in order to meet the various changes brought about and to adapt the whole to the requirements of the age. It is only by the careful, deliberate, and effectual application of such alterations and modifications that our political system is enabled to bear up against the perpetual inroads which time and circumstances inevitably make upon it.

During the last thirty years, very important changes have been effected in our laws and social institutions. Those changes, probably, have been the more numerous and palpable in the period mentioned, because the wars in which for many years we had been previously engaged prevented us from gradually introducing the requisite modifications at the time they became necessary : our entire social and political system had consequently become partially deranged—it had been suffered to grow wild. Hence the numerous and apparently radical alterations that have taken place.

However, the various changes above adverted to should have been, and similar ones hereafter, *if possible*, should be, like all changes in nature, carried into effect gradually, and as it were imperceptibly, in order that such organic alterations in our social affairs may be attended with the most beneficial results to the community at large, at the least possible inconvenience to the parties immediately affected by them, otherwise their adop-

tion may occasion disorder as well as individual hardship. Whether some of the changes which have been made during the period named have not at once been too sweeping and sudden it is not necessary to determine; be that as it may, one thing is certain, that they were loudly demanded and insisted upon by so large a part of the community, that they may be said to have been nationally required.

In addition to a numerous class of changes which have taken place in other matters of considerable importance, the following measures, some of which affect society throughout all its various ramifications, have been carried into operation during the time mentioned.

The mode of providing a maintenance for the poor has been entirely altered. Whatever praise or censure may be passed on the old poor-law or the new, it requires no argument to prove that some legislative interference had become absolutely necessary, or that the change which has been accomplished has been extensive indeed.

The Tithe Commutation Act was another measure for ascertaining and settling interests of the most complicated and opposite kind. Almost every landowner and titheowner in England and Wales was deeply concerned in its results—no doubt the tithe system, directly or incidentally, affected the whole community.

Railway legislation has introduced various changes into our social policy. The ancient adage that "a man's house is his castle," vanishes into mere moonshine under railway law; and yet this irruption upon the venerated rule of the *meum* and *tuum* law of property is alleged to be required for the general weal. We do not assert its necessity in every case, or denounce its oppressive bearing in others; we simply state the fact, that such has become the law of the land.

The Acts for disfranchising copyhold lands, and for inclosing commons, may be placed in the same category. In some instances they interfere with vested rights and ancient customs, not very long since considered almost sacred, and regarded as the most venerable landmarks of our constitution; but, nevertheless, those Acts were required for the public good, and they

became law, under the general impression that the state of the country claimed them.

Now, each of those public measures, but especially the Poor Law and the Tithe Commutation Acts, may fairly be said to be of national concern, in a popular sense; they were very generally considered to be absolutely necessary measures, and they became law because they were so powerfully demanded.

The duties attendant on those important enactments were so various and laborious, that it became necessary to form a kind of government in miniature, which was generally a *triumvirate*,—namely, a commission, for the purpose of forming rules and regulations for the due performance of those duties, and to direct and superintend their execution.

In Knight's Political Dictionary, a commission is defined to be a warrant or letter patent, by which a person is empowered, or persons are empowered, to do any act, either ordinary or extraordinary.

In the cases above alluded to, however, the Acts of Parliament which made the measures law, commonly empowered some members of the government to appoint three commissioners. The Board of Commissioners thus constituted, had the power to appoint assistant-commissioners, secretaries, clerks, &c., to carry out the objects of the Legislature.

The constitution of some of these Boards with reference to the complicated and arduous duties intrusted to them, will form the subject of remark hereafter. At present it will be assumed that in each case, the commissioners were perfectly well adapted, both by habits and acquirements, satisfactorily to discharge the important functions of their office.

Nevertheless, it must be self-evident, we think, that the commissioners, necessarily resident in London, could only make rules and give orders and directions. As far as the actual carrying the measures into operation and effect was concerned, they could do nothing. It was utterly impossible that the commissioners could really perform all the requisite duties throughout the country. They had, consequently, to provide themselves with assistant commissioners, who had to treat with parties interested on the spot. Upon, therefore, such assistants'

tact and aptitude for the delicate business, must, in a great measure, have depended all the operative part of the measure, and much of its ultimate success. The commissioners at their office might form the most judicious regulations, and issue the plainest and wisest instructions; but it is one thing to lay down rules, and quite another matter to carry them into action; it is often very easy to theorize at a distance from the parties to be affected, but it becomes a very different thing to treat with the subjects of the theory—involved, as they frequently are, in conflicting interests, which are unknown, and unsuspected, until the moment of touching them has arrived.

One instance may be sufficient to show how mere theoretical notions may clash with practical experience. In some cases connected with the commissioners, it has been necessary to call meetings of all the landowners and parties interested in the lands of a parish. It has appeared to Boards of Commissioners, who were themselves comfortably ensconced in handsome official apartments in London, that such meetings, in every case, should be held in the parish: they have, therefore, laid it down as board-room law, and made it imperatively binding on their assistants, to hold such meetings in the parish. Now, whether those rules have been established with the laudable desire to give parties the least trouble—"by carrying the commissioners' justice to every man's door," or merely to give an appearance of being accommodating to the public—nothing can be more absurd and vexatious than such regulations in actual practice. Very frequently indeed has it happened, that there is no kind of room in a country parish adapted for the transaction of such business, which often requires separate apartments for the different parties to discuss their matters at a distance from the general meeting. Professional men, and others, who had come perhaps a long journey to attend the meeting, have found no place for man or horse. If the meeting has been holden, conformably to Board regulation, at a road-side inn, with all its misery, the *expense* has often been greater than it would have been at the *nearest convenient* inn, where business of the kind is commonly transacted at regular charges. It will be at once admitted that such a mode of apparently accommodating the

public is very cheap to commissioners, who never attend such meetings, and are totally unacquainted with the inconveniences which such absurd rules necessarily entail on all parties who have to do the work. Regulations of this description, so easily formed in London, have often been a sad nuisance to every one concerned in the business. Had Boards of Commissioners actually to do the work, instead of dogmatically theorizing upon it at a distance—or were they practically acquainted with such matters—such rules would never be made—much less enforced.

The *nearest convenient place* for meetings of the kind is all that Boards in London should concern themselves about. It is well known that regulations of the kind we have been discussing have often occasioned great inconvenience to all parties, and entailed much additional expense upon the very persons whom they were intended to benefit.

Having made this short digression upon a practical point which, in our opinion, deserves the consideration of Boards in London who direct the management of business in the country, a brief discussion of the tithe-commutation measure may not be out of place, especially as that object of the Legislature has just been completed.

It is somewhat difficult to imagine a social measure attended with a greater number of complicated difficulties than was the commuting of the tithes of England and Wales. According to Mr. Eagle's account, there are 10,650 parishes included in the Commutation Act. In almost all cases, even the simplest, the interests of the landowners and titheowners were decidedly opposed to each other. These very intricate, powerful, and conflicting interests had to be permanently determined, and parties had to be induced, or compelled, to agree, who had never agreed before. But when the parties had amicably fixed the sum to be paid and taken, it has been the commissioners' duty and practice to satisfy themselves that the contract was equitable and fair, before they sanctioned it by their confirmation. Consequently, in most cases, before questions of *modus*, tithes of coppice, &c., &c., could be equitably adjusted, matters requiring an intimate knowledge of law and equity must be investigated and adjudicated upon. The Board of Commissioners in London could not

be present at such investigations; nevertheless, they had to be satisfied that strict justice was done to all parties interested: they could only obtain this knowledge by delegating the necessary authority to an auxiliary of competent acquirements to perform the duty, and to place the result before them. It will, no doubt, be conceded that, effectually to accomplish work of that nature, not only the requisite knowledge of law was necessary, but also some practical experience in taking evidence, and applying the evidence so taken to the establishing of facts. The Tithe Commissioners, therefore, in the performance of their varied official duties, have been obliged to engage many barristers as assistant commissioners: they could not otherwise have settled the numerous legal points that have occurred in almost every case. Such barristers, or at least men possessing the necessary legal attainments and experience, were absolutely requisite to carry the measure satisfactorily into operation: the indispensable claim of the commissioners for legal assistance must have been manifest to the projectors of the measure; they must have perceived that its complicated machinery could not be made to move without it.

It must not, however, be forgotten that the difficult task of fixing a sum to be hereafter paid in lieu of the tithes of a parish, was only one part of the commutation business. The next step was almost equally difficult; namely, to have the sum so agreed upon between the landowners and titheowners for the whole parish justly apportioned upon each landowner's land. Can any object be imagined more perplexing to accomplish than to satisfy bodies of men, perhaps of different creeds and parties, that their lands, it may be of various descriptions, are charged exactly in the same proportion? In this part of the business questions of law and equity were continually arising, and their settlement was a necessary preliminary before the apportionment of the rent-charge could be completed. In addition to the arduous task of determining the permanent sum which landowners had to pay, and titheowners to receive, as an equivalent for the tithes, and the apportionment of that sum upon each landowner's lands, the Legislature invested the Tithe Commissioners with the power of settling questions of disputed bound-

dary between parishes. Perhaps it is unnecessary to point out the advantages to the parties interested of determining such disputes summarily on the spot; nor is there much occasion to dwell on the labour and difficulty of adjusting such disputes, which not unfrequently involved incidentally rights and interests of very considerable importance. Very often the disputed lines extended many miles, and consequently large tracts of land involved in the dispute were in one parish or the other. Each party supported its supposed rights by every kind of evidence, adduced and maintained by the best advocates that could be made available. We have known cases that occupied several days in taking the evidence, and from the mass of conflicting testimony so given, the assistant commissioner had to extract his decision as to which line was the boundary. Several hundred boundary disputes have been settled in this way. Comparatively speaking, only a very few of the commissioners' decisions have been carried into the courts above, and in most of them the award has been confirmed. One of these cases occupied a judge and a special jury nearly three days a few years ago in South Wales; the assistant commissioner's award was confirmed: we refer to the case, because we think the length of time occupied in the rehearing will furnish the reader with some notion of those boundary disputes that the assistant Tithe Commissioners had to settle by a *summary* process.

We have dwelt at some length, and in the first place, upon the tithe-commutation business, because we believe it is now brought to a close. The intentions of the Legislature in passing that Act have been carried into operation, and it is a well-established fact that, generally speaking, the Tithe Commissioners have performed their very arduous duties so as to satisfy the great body of their countrymen with whose interests they have had to interfere. The commissioners, it is believed, have acted upon the broad principles of equity and justice; their assistants, encouraged by them and animated by a like spirit, have endeavoured to carry out those principles generally throughout the country; and the result is, that a measure, which at first appeared to be attended with surpassing difficulties, and hedged round with conflicting interests, so formidable that even its

warmest advocates and ardent demandants *hoped* for its final accomplishment rather than *expected* it, has been completely and satisfactorily carried into effect. The commutation business has been brought to a close with very little litigation; and, taking the whole scheme into account, with perfect satisfaction to the country at large.

Although, in our opinion, the country has good reason to congratulate itself on the satisfactory completion of a measure so comprehensive, and so deeply affecting such powerful interests, we think it has just cause to regret the recent loss of a faithful public servant, who from the beginning to the end has been one of the chief directors in carrying the measure into operation,—we allude to the lamented death of Thomas Wentworth Buller, Esq., which occurred a few weeks ago, at his seat in Devonshire, whilst he was apparently in the vigour of life, just as the tithe-commutation business had been brought to a termination. Captain Buller was a practical agriculturist of acknowledged skill and experience; he had given the subject of tithes much consideration, and well understood its theory. Long before the Tithe Commutation Act was passed he had made himself thoroughly acquainted with the tithe system, and with its varied bearings and effects upon agricultural matters. Extensive knowledge of this kind was an indispensable qualification for a proper discharge of the Tithe Commissioners' duties. In numerous instances the value of the tithes could only be determined by ascertaining the quantity of land in a parish annually sown with wheat, barley, and oats; also green crops, hay, &c.; the average quantity of each per acre; the number of cows, sheep, &c. In some cases the inverse of this mode was necessarily adopted, namely, by knowing the quantity and quality of the different lands in a parish, the quantity of titheable produce that they would yield per annum was deduced. These data furnished a double test as to the value of the tithes in kind of a parish. The commissioners in almost all cases, even in voluntary agreements, had these facts ascertained, in order to satisfy themselves that the contract entered into was equitable and just. It was remarkable how nearly the value of the tithes determined by these statistical facts generally coin-

cided with that settled by the rigid valuation of competent surveyors. We may here observe that we are certain there is an immense stock of statistical information with respect to agricultural matters at the Tithe-office, that might be rendered highly useful, and which we think should be made serviceable to the public.

It was from this source of facts, carefully collected on the spot by the assistant commissioners and other trusty agents, that the commissioners derived their information and knowledge for testing awards and agreements. Captain Buller's intimate acquaintance with the various sorts of lands, crops, &c., enabled him to apply the test with the tact of a master, and his solicitude that strict justice should be done to all parties was without intermission from beginning to end. As long as there was a complaint which appeared to have some grounds, or a disparity unexplained, so long had the matter his anxious attention; nor would it obtain his sanction until his clear head and manly intellect had convinced him that mutual equity was done to all parties. This opinion is founded upon the knowledge of a vast number of cases.

We are inclined to believe that people generally have no conception of the wear and tear of the Tithe Commissioners' duties during the period that the commutation business was in full operation. Letters of all kinds were claiming their attention by the hundred—agreements and disagreements—awards, apportionments, &c. &c., from all parts of England and Wales, were urging demands for their decision; and this immense pressure on their attention, be it remembered, was not for a month or two, but for at least ten or a dozen years.

As a coadjutor with Captain Buller, the country fortunately secured the services of William Blamire, Esq., the late member of Parliament for Cumberland,—a gentleman whose practical knowledge of the subject was also of the first order, and who, like his colleague, was incessantly solicitous that impartial justice should be administered to every one. So anxious was he on this point, that for many years we believe Mr. Blamire read every document that came into, or that went from, the Tithe-office. He was commonly the first at the Tithe-office in the

morning, and the last to leave it in the evening. It required Herculean strength to follow this course year after year,—not one in a thousand could have undergone the immense toil, both mental and bodily; it did not altogether crush the veteran commissioner, but his great strength and indomitable will were at last incapable of bearing up against it, and to some extent for a short period, they were compelled to give way. No doubt, the other commissioner, the Rev. Mr. Jones, performed his part in the business with zeal and credit; but our actual knowledge does not enable us to speak with the same confidence, with respect to the performance of his official duties. Moreover, we believe the reverend gentleman during the time of the commission, held two professorships at two establishments, some miles apart. Probably, therefore, his attention to the tithe work occasionally had some relaxation.

Captain Buller, to the irretrievable loss of his family, and to the sincere regret of a great number of his countrymen, who held him in the highest esteem for his unswerving integrity and manly uprightness, was cut off just at the termination of those arduous labours. We trust to be pardoned for dwelling so long upon the subject, and for the feeble attempt that we have made to do justice to his official career. We feel that the country is deeply indebted to him and to his colleagues, Mr. Blamire and the Rev. Mr. Jones, for their long, arduous, and faithful services. We trust, in no long time, the nation will perceive the policy, as well as the justice, of duly honouring the truly heroic commanders, who so successfully perform social achievements of such vast importance to the community. We hope yet to see the time when public distinctions, the best that the public has to give, will be duly bestowed on men who devote their mental energies and their bodily strength to the accomplishment of matters of such deep interest to the public weal, and who wear themselves out in that part of their country's service which tends to increase the happiness and prosperity of the great mass of the people. We should be sorry to see Great Britain parsimoniously dealing out her honours and rewards to her military and naval heroes, who, when duty calls, nobly defend their country. But there are heroes of peace, as well as of war; and there are victorious

achievements, which bring social prosperity and national happiness in their train, as well as others, that are gained by sanguinary carnage, and leave misery and devastation for mementos. The risk of life may be more chivalrous perhaps, but it is not greater in the battle-field than it is amidst the unceasing toils of responsible and weighty public duties; and we repeat that the one class of public servants is as justly deserving of the nation's gratitude and honours as the other is, and we hope, hereafter, that it will not be so dazzled with the merits of the one, as to be totally blind and oblivious of the deserts of the other.

Having made this digression as an act of public justice, we will briefly consider the measure with especial reference to its consequences to the members of the Bar, whose services it required: we believe it is a specimen of the treatment which barristers must expect from engagements in similar duties,—we know that many have experienced it.

The business of the commutation occupied many years: during eleven or twelve of which the whole staff of the Board was actively employed. We apprehend there will be no dispute about the benefit which the settlement of the tithe question has been, and will be, to the whole community: it removes all the impediments to agricultural improvements which the tithe system so prolifically yielded; it consequently tends to bestow on the country the advantage of raising as much produce as possible within its own territory,—and in this manner, permanently to increase the resources of the country for self-dependence. Its putting an end to numberless feuds between tithe-owners and tithe-payers, is a gratifying fact, which ought not to be kept out of sight in forming an estimate of the benefits of the measure.

Now, admitting that this legislative enactment has been satisfactorily brought to a conclusion,—that it was required by the country generally, and that England and Wales throughout their whole extent, gained by its accomplishment; and we believe that no rational dispute will be raised upon these postulata; is it, then, an unfair question to ask what should be done with the parties, who during so long a period have devoted their

time and energies to the business? Before we say another word, we wish utterly to repudiate the notion of pensioning, and all manner of drains on the national purse; but we deem it a matter highly deserving the attention of the public, whether it be just or fair to use the services of a large number of men for so many years, and at the end, when they have rendered important advantages to the country, coldly to send them about their business, and leave them to commence another course in the best manner they can. If this has been done, the public is the only master that treats tried and trustworthy servants in this harsh and unnatural manner. In other cases, when subordinates have faithfully and satisfactorily laboured so many years, and have carried out the advantageous schemes of their employers, such tried servants are commonly set about other affairs of perhaps a more elevated description; at all events, they are seldom turned adrift henceforward, to gather stubble instead of straw: care, at any rate, is almost always taken, that they are not placed in a worse position by their long and faithful labours. The public alone, it is said, is the only master that does not appreciate such genuine services,—it is the only extensive employer that avails itself of the needful aid of others' hands and heads, and then turns its back upon those who have rendered it. The public, as a master, belongs to the Simon Legree school; it is quite as exacting, equally despotic, and not at all more just or compassionate. There would be no difficulty in setting forth a long list of clerks, agents, and others, who have faithfully served the public for many long years in its weighty matters; and at last, having completed them, have been indifferently sent to find another master where they can find one. We assert that the public is not justified in thus dealing with its servants, and that by following such a despotic course, it very often causelessly inflicts serious and permanent injury on men to whom it is under lasting obligation, and whom it ought, if possible, to befriend: we wish the public, as an employer, to act like other masters—*faithful and effective services should be rendered*—but there should be justice done on each side; we emphatically deny that Mr. Public invariably acts upon this golden rule.

Take, for instance, the members of the Bar in reference to the tithe-commutation measure: suppose any of them have been instrumental in arranging and finally determining this national question; that in accomplishing the work they have evinced talent and exercised judicious discretion; that the kind of assistance which they have afforded was absolutely requisite, and that the scheme could not have been completed without it. Ought their labours in this measure, so beneficial to the whole country, to be *professionally* an injury to them? Is it common justice, or any justice whatever, that the nation at large should gain an admitted advantage by their services; and that they, simply because they aided in accomplishing the measure, should in any manner be placed in a worse position, with regard to their professional prospects, than probably they would otherwise have occupied? In answer to this it may be said, "The barristers, &c., have been paid for what they have done, and therefore, having received the *quid pro quo*, they ought to be satisfied." Stop—not so fast: with regard to stipend they have been usually paid three pounds a day, *net*—WHEN *employed*. Now, considering the number of days in a year when they were not officially engaged, and consequently had no wages—the pay named for the work, some of which was arduous and irksome in the extreme, cannot be considered over liberal. But this was not all: we have been told that any barrister who was engaged to take an active part in the business, was not expected otherwise to practise in his profession; and for this reason, he would probably have to treat with all the solicitors in the neighbourhood of his labours,—and perhaps with many others,—and would have to adjudicate upon matters in which they were engaged: should therefore any of these attorneys give briefs to such barrister in other cases, they might have—or which amounts to pretty nearly the same thing—they might be supposed to have, greater influence with him than other solicitors who did not intrust him with professional duties. In such delicate business, it was clearly the duty of the commissioners to give no reason even for suspicion: the rule therefore was judicious, and it is known that the Tithe Commissioners were not willing that it should be infringed. But however discreet and necessary the

regulation was, its consequence to the barrister was, that to a certain extent he had to relinquish his profession. Whilst engaged in the commutation affairs, the nature and regulations of his engagement prevented him from forming a PROFESSIONAL CONNECTION—the sole MAINSPRING of a barrister's success. On the contrary, the independent discharge of his official duties compelled him to keep aloof from all overtures of such connection. How stands it then, with such a man at the end of ten or a dozen years' labour? Why, he has to undergo the irksome task of moving backwards; at that time of his professional career, he must take a retrograde move: he most likely, at that time of day, must become a "sucking barrister, seeking sessions practice;" he is in the mortifying position of being a senior, with a large number of juniors above him in point of actual practice, acquired whilst he has been engaged by the public.

After having been for years accustomed to hear evidence, to weigh it, and to decide upon it, he is compelled to put aside all that judicial accomplishment, and to deal in pettifogging cavils and hair-splitting special pleading, under the direction, it may be, of some justice, made a veritable Daniel for the Quarter Sessions judgment-seat. Very likely, moreover, in the conscientious discharge of his public duties he has connived at no jobs, and, as a natural consequence, made few friends; he probably has permitted no overcharges or irregularities, but by such exactness he may have made enemies; he may have held the scales of justice between parties perfectly upright, but the fact may be kept in remembrance, and be very far indeed from getting him sessions briefs: he once evinced no favour, and showed no partiality—none of either can he now expect, or does he get. The public, for which he zealously and effectually laboured, has done with him, forgets his services, and leaves him to trudge on as he best may. If there be instances of this kind, as we know there are, can the public justify itself in thus treating men who have, so advantageously for its interests, done its services?

Perhaps it may be remarked, that a servant of the public, who has discharged his duties with satisfaction, may generally obtain similar public employment? Were it so, the public would

treat its servants like other employers, and there would be no room or cause for complaint; but the getting such employment, instead of being a general rule, as far as any individual public servant is concerned, is a bare accident of an accident: if he possesses political influence, which at the time predominates, he may even be promoted; but without such a serviceable adjunct, his meeting with any engagement of the kind is altogether problematical; indeed, his chance is exceedingly small amongst a host of claimants backed up by all sorts of influence. The question is, has he a just claim to it? Ought the public to sanction and support such claims? Does it, as a general rule, act upon that principle? Does it, or does it not, permit its servants faithfully to effect its most important measures, and then throw them aside as useless, or treat them as incumbrances? If such be the rule which the managers of public affairs intend to act upon, the junior members of the legal profession, especially barristers, ought to be made fully aware of it, and it is for that purpose that we have entered upon a discussion of the subject. There is some reason for suspecting that the leaders in public matters commonly follow that rule. The cases of Mr. Parker and others will immediately occur to confirm that view. Moreover, Lord John Russell some time ago, in discussing the well-known case of Mr. Parker, was reported to have said, in the House of Commons, that barristers like Mr. Parker, who had undertaken the duties of assistant commissioners, had *relinquished nothing* by so engaging. His lordship, in making that assertion, must have been under the impression that Mr. Parker had nothing to do professionally, and stood no chance to obtain professional business when he undertook the duties in the Poor Law Commission; or he must have imagined that notwithstanding Mr. Parker's multifarious and incessant official duties, he at the same time kept up his professional connection in all its bearings. Mr. Parker's admitted energy and talents are proof that there was no ground for the first assumption—namely, that he had no professional business, and was not likely to get any; the remaining supposition that he could at the same time attend to his official vocation and to his profession, is simply impossible. Lord John is usually

cautious, and not at all prone to make assertions that are not justly founded on fact. If the reports be correct, the difficulty of the task which his lordship had undertaken, may have led him to dogmatize upon a subject which he had not thoroughly considered. His lordship, however, is a lover of pure justice, and we would fain hope, by this time, he is convinced that he was in error when he stated that assistant commissioners gave up nothing in undertaking such duties, implying by it that they had no right to complain, even if they are capriciously or tyrannically deprived of their public employment; that no grievance is inflicted upon them, if, after incessantly toiling in a public capacity of great responsibility for a long period, they are groundlessly ill-treated by their official superiors, and suddenly, perhaps insultingly, turned upon their own resources. We trust his lordship now entirely disavows this doctrine. If, however, Lord John Russell propounded the rule that is to be hereafter followed with respect to such engagements (and certainly the announcement could not come from a higher quarter, nor has it, that we have seen, been officially modified), we think the members of the Bar, particularly the lower grades, should take the rule into their most serious consideration. When an ardent, but (politically speaking) an inexperienced, barrister is about to lay hold of a bait, labelled "*public work*," his more cautious brethren ought to shout, "Ware commissioners." "Remember the treatment that many assistant commissioners have experienced, and pause." "Bear in mind," they might add, "that you are about to estrange yourself from your own profession, to enter upon a clap-trap engagement, in which, if you do your official duties well, your official superiors may seize and appropriate to themselves all the credit; if they should be incompetent to perform their parts, the censure of their failures may be laid upon you; they may plume themselves with the successful results of your energies, and you, as far as possible, may be made responsible for their heedlessness and bungling; they may use you just as long as your services tend to promote their interests, or until one of their cousins or hangers-on can be crammed so as to fill your place,—at any rate, to receive your pay;—you may then, very likely, be unceremoniously discarded.

It may be that some trap will be laid for you, to make your dismissal appear justifiable. Probably some trumpety overcharge may be mooted, which you may be called upon to explain: if you, caring little about the trifle, admit it, the plea will be, that you had attempted to impose upon the public, and then your superiors will claim great credit for getting rid of such a servant; and it will be well for you if they do not send you forth marked Jew, who made an attempt to charge one sum, and very contentedly accepted a less one. But knowing the imputation of overcharge to be utterly without foundation, should you remonstrate, or use any strong common sense in self-defence, depend upon it, your explanation will be deemed insubordinate, and off you will be sent: in either case, the trap has effected its purpose; you will be got rid of. Eight or ten years' hard work will have blighted your professional prospects, and you will be sent adrift, stigmatized as very Israelitish in money affairs, or too self-willed and insubordinate to be serviceable." Mr. Parker, and many other commissioners' victims, would almost justify hints like these, especially if the doctrine above ascribed to Lord John Russell be well founded, and still in practical operation.

We have already touched upon the point as to how the public treats its servants who have been instrumental in carrying its most important measures into effect. At first sight, it might be supposed that the commissioners, at the end of their undertaking, would exert themselves to procure suitable employment for men who had been so usefully serviceable in carrying the scheme, of which they have had the direction, into operation. The doctrine above discussed, that assistants, &c., deserve no consideration, except their *quid pro quo*, given as wages, would be a sad obstacle in the way of commissioners' application, were they to make it at head-quarters. It should, however, be borne in mind that, after all, commissioners are very like other mortals, having their own interests uppermost: they must first mind themselves; next they may have brothers, cousins, and relatives, very frequently in the attitude of crying "Give, give." It is quite natural for men first to take care of themselves and their own immediate connections; by the time

that rational business has been attended to, very little indeed remains to be done for others. Thanks for efficient services, and apparently sincere hopes for future prosperity, are all that the jaded sub can well expect from that quarter; all beyond these terminating ceremonies is barren and frigid. Here the maxim, "Blessed is the man that hopes for nothing, for he shall not be disappointed," applies in all its vigour; and happy is he who can practise the philosophy contained in the apophthegm, for he has little else to rely upon. It is well if this be all: the half worn-out subaltern may possibly be fed for some time on plausible promises, which, from the beginning, were intended to end in nothing. It is lucky for him, if, when he has ended his labours, he does not find to his cost that men, to whom he has every reason and right to look for encouragement and friendship, have learned state craft sufficient to mimic their masters, and to express their promises and kindness in that kind of phraseology which means something, or anything, or nothing at all. It is not meant to assert that such tergiversation and deceit are generally practised; on the contrary, numerous instances of true-hearted friendship and noble bearing of commissioners towards their servants might be adduced. Still the dark side of the picture has been experienced; the possibility of its occurrence is maintained, and the past should not be forgotten.

We have already made some remarks on Lord John Russell's reported dictum, that barristers gave up nothing in engaging as assistant commissioners, &c., and we have expressed hopes that that distinguished statesman may have relinquished that opinion as untenable, and being opposed to reason and fair play. If, however, the rule be still acted upon, so unjust do we consider its operation on our profession, that we must again insist upon the justice of making it more generally known. In other cases, it is illegal to set man-traps without giving due notice of the danger; and upon this principle, if the rule be continued in an active state, we are of opinion, that the door of every commission, after the manner of Dante's Inferno, should notify that "whatever barrister engages here, must leave all hopes of professional advancement behind." Such notification would put members of

the profession on a fair footing at starting; it would properly inform them that they must hope for nothing; and if they hope for more, they have no right to be disappointed if they do not get it. At all events, if the rule remains, we are anxious that the general impression which has hitherto prevailed, that members of the legal profession who accept engagements in commissions, or in any public business requiring legal knowledge and experience, have claims for similar employment, and that their future promotion lies in that direction, should be completely removed, because we believe it to be misleading and pernicious in a very high degree.

It is commonly supposed that all promotions and distinctions which are conferred on members of the legal profession are bestowed by the public, or its synonym—the powers that be—on the most distinguished or most fortunate practitioners. No fault is intended to be found with this custom in its origin; but clearly it is an old one, and it is equally manifest that circumstances and customs have altogether changed since that rule was first adopted. In a recent article,¹ we made some observations on this topic; we then remarked that when the custom began, the courts of law at Westminster were the only arena for forensic display, they were the only fields in which legal trophies could be achieved or judicial laurels culled: legal talent and judicial experience were then not required by the country to be exercised elsewhere. But has this been the case during the last twenty years? Have not the various modifications of our social system, to which reference has been already made, entirely changed the aspect of things in this respect? Can it now be maintained that legal talent is only required to be exercised in matters affecting individuals in our highest courts of law alone? Is it likely to be so in future? In our opinion the important Acts of the Legislature which have been named in this article, and the general course of legislation now in progress, afford incontrovertible answers to these questions. The people, by their representatives, demand certain measures—to carry such measures into operation, men having a competent knowledge of the law are indispensable. No one who duly considers the

¹ Vol. xlviii. No. 96, p. 35.

legal difficulties that continually occur in the working part of the Poor Law Commission, the Tithe Commission, the Copyhold Commission, &c., will dispute the point? Well, then, are members of the legal profession, whose services the country requires, to sacrifice all their professional prospects, if they undertake these public duties? If a barrister manages a matter well for a solicitor, it very probably will bring him other business: a few prominent cases thus fortunately completed not unfrequently lead on to fortune and distinction; but if the same talent be devoted to the public service, even with the like success, what does the barrister gain by it? Why at the end of a ten years' arduous service, made up of such achievements, he is given to understand that when he undertook his public duty he gave up nothing, and therefore he ought to expect nothing, and be thankful. Since you, Mr. Public, are the dispenser of legal rewards, will you permit us to ask you, whether, in your opinion, questions which deeply affect the whole community are of less consequence than those which arise between individuals? Do questions, having such important bearings, require, think you, only a lower scale of legal knowledge for settling satisfactorily, than do mere disputes between Tweedledum and Tweedledee? Does, for example, the fixing a permanent sum on a person's freehold require less knowledge of the law, and less care in applying it, than it does to ascertain whether A. owes B. a trifling sum which they dispute? In a word, are the legal disputes, think you, which occur in general measures affecting very often the whole people of a district, of less importance to you, Mr. Public, than the mere disputations which arise between litigious individuals? If they are not, why do you, Mr. Simon Public, bestow all your favours on the class of lawyers engaged in the latter, and none whatever on those who toil, *at your request*, in the former? Come, Mr. Public, be candid and honest for once. From the labours of which class of lawyers do you derive the greater benefit? To whose exertions are you most indebted—to him who successfully employs his talents and acquirements, *by your inducement*, in carrying a truly national measure into operation, which tends to improve the whole country as well as to increase good-will amongst the entire population; or to him

who exercises the same talents and acquirements, but not at all greater, in bamboozling a judge or bothering a jury, upon cases of no consequence whatever, except to the irritated parties immediately interested? We believe you cannot venture to give more than one answer. Why, then, Mr. Simon, do you treat your own faithful servants, whose aid you required, and whose assistance was indispensable to you, with chilling apathy and blighting neglect, and confer all your rewards and distinctions on practitioners making their own advancement, and House of Commons adventurers, who seldom render you any actual service, except by accident? It is believed that you cannot controvert the general accuracy of this mode of treatment, which is as anomalous as it is unjust.

The effective manner in which the Tithe Commission has been worked throughout, may, in no slight degree, be attributed to the labours of Mr. Hovenden, the secretary to the commission; he is well known to be a talented and experienced lawyer. The country required and engaged the exercise of his acquirements and ability, and now stands deeply indebted to him for having very efficiently assisted to accomplish one of the most important public measures that was ever determined. During many years he has been assiduously labouring in the public service. Here, again, we ask, to whom is the public most indebted—to such a servant—or to the lawyer who attends Westminster Hall to debate differences between Paul and Peter? Yet, in that long period that Mr. Hovenden has been noiselessly, yet incessantly and effectively labouring for the country's welfare—men, young in the profession, have passed on, perhaps under some patron's interest, to the House of Commons—been used there, and then drafted off for titled posts and distinguished rank, having done little or nothing, except by chance, for the public, which confers on them its choicest favours. Legal suns have thus emerged from their nebular state mounted in the attractive orbit of self-interest, and culminated in the time named. But which of them has rendered more valuable service to the public—the bestower of rich rewards—than Mr. Hovenden? What has been done for him as a recognition of his meritorious services? The public may have honoured him so that its left hand does not know

what its right hand has done : at any rate, its especial favours to him have not been made known to us through the usual channels. The public, as a general rule, has hitherto conferred all its best legal gifts on men who have sedulously followed their self-interest, and done nothing whatever for the common weal : whilst talents and knowledge of high order, exercised most usefully and satisfactorily in the public service during extended periods, have been unrecognised : serving the public zealously and faithfully at its own desire, and for its particular benefit, not only obtains no promotion or distinction, but frequently becomes an insurmountable impediment to the attainment of either. We trust that a system so unnaturally absurd, and so thoroughly repugnant to British honesty and British justice, will not much longer be tolerated.

In commencing this article, we intended to enter with some minuteness into the constitution of several commissions—as to the nature of the duties which they comprehend, and the qualifications of some of the commissioners properly to superintend the execution of those duties. There is a noted maxim, generally ascribed to king George III. which, on account of its never-failing conformity to real fact, and the universality of its application, deserves a prominent position in every system of political philosophy. The axiom is, “That any man is always fit for any post he can get.” It formed part of our original scheme, to give illustrative examples of this royal adage. We know no subject that more completely displays the immense power attached to the inherent qualification of being able to get posts, than commissions exhibit. One instance readily occurs in which that necromantic kind of influence, suddenly, as though touched by a conjurer’s wand, makes its possessor the chief of a host of commissioners, and at the same time converts him into the principal director of a vast number of other weighty concerns, though up to the moment he was totally unacquainted with the whole. We think this all-potent qualification of getting posts, which, like Aaron’s rod, appears to swallow up all other accomplishments, has in more cases than one had the effect of practically elucidating the story of the showman’s horse putting the tail where the head should be ; we mean that there

have been instances where men celebrated for their knowledge of the business, and intimately acquainted with all its details and duties, have been placed in subordinate offices, while others, invested with that surprising capacity which the above royal peculiarity always imparts, have been placed to rule and direct the business, although, from the nature of the thing, they could know nothing about it. We have, however, for the present, been prevented by time and circumstances from entering upon these discussions. We will only simply remark that, in our opinion, when the subject-matter of a commission necessarily requires knowledge and experience of a specific description to deal with it efficiently and properly, men noted for the requisite qualifications should be selected for its directors. Commission-makers hereafter may, it is thought, very beneficially-adopt and follow this rule, instead of being too rigidly swayed in their choice by the all-absorbing influence to which reference has been made. Moreover, the appointment of duly-qualified men to superintend a commission, affords, perhaps, the best criterion to prove, at the commencement, that the objects of the commission are really intended to be carried into effect, and that the whole scheme has not been concerted purposely to become an abortion. Commissions are not unfrequently constituted so as to form a kind of petty government *per se*, an *imperium in imperio*: the whole community, we fancy, must take some interest in their efficiency, and, therefore, we trust to be excused for our desultory remarks upon the subject.

It is admitted generally that the Bar as a profession has been very sadly depressed during the last few years; in the foregoing article we have discussed one topic which we know has deeply injured a considerable number of barristers; there are other matters which act injuriously and unjustly towards the profession. The prohibition contained in the first County Court Act has, notwithstanding Lord Campbell's strenuous endeavours to retain it, been removed; but the gross injustice which the clause so wantonly and unreasonably inflicted on the junior members of the Bar cannot easily or speedily be repaired. The attorney advocates whom that Act called into action, still retain their standing, and adopt any kind of subterfuge to maintain it. Those

hybrid advocates comprise very few indeed, if any, of the higher order of attorneys or solicitors; on the contrary, they are commonly practitioners having no scruples to restrain them, nor credit to lose—one divinity has given them talent; another, darker one, the use of it; but no junior barrister who has any regard for his position can consistently enter the list with them as a competitor, and render himself liable to their hard-mouthed and unscrupulous treatment. To gain a victory in a contest with them would be just as creditable as to come off victoriously in a turn at fisticuffs with a chimneysweep. The consequence is, especially in *provincial districts*, that barristers cannot attend County Courts, and the attorney advocates continue to engross all the practice. The business of the assizes has dwindled down to almost nothing,—just the result that might reasonably have been expected. The public prefers cheap and simple law to costly and complicated: the Bar does not complain of this, the preference is perfectly natural and reasonable; but the junior members have just cause of complaint that steps were not taken in due time by the heads of the profession, so that they might have freely and fairly entered into the competition that has arisen. The Bar has an etiquette which originated when legal matters were in a totally different state from that at present; it now tends in various ways to hamper the junior members, who are ornaments to the profession by their honourable conduct; whilst less scrupulous practitioners set all etiquette at defiance with impunity, and not unfrequently gain considerable advantage by their daring; still such infractions are, or ought to be, a loss of caste. The establishment of County Courts introduced a new order of things: it must have been obvious that the old rules, with regard to fees, &c., were unsuited to the innovations; it was therefore the duty of men who preside over the profession to modify practical regulations, so as to adapt them to the present circumstances. Quarter Sessions business is also equally diminished, and the remainder, under the management of sessions judges, is a source of petty annoyance. The whole system of sessions procedure ought to be thoroughly remodelled; it is clumsy, expensive, absurd, and altogether unsuited to the policy of the present time; it has outlived its usefulness, and has

become a public incumbrance. We trust that Lord Brougham, and his coadjutors in legal reform, will not delay to take the subject up; there is not one so extensive that so loudly demands their attention.

In pointing out the rough and unjust treatment which the Bar has experienced, and calling for reforms which must still further affect its interests, we again repudiate every notion of aiming at any immunity for it; but we do demand common and equal justice for it, which we deny that it has latterly received. Unfortunately, we think, the Bar has no institution to protect its interests, and to guide its members, as the other part of the profession has in the Law Institution. Had the Bar such a ruling establishment, occurrences like some of those which have been adverted to could seldom happen. Just in proportion as events have diminished the practice of the junior Bar, has the number of barristers increased. It is unreservedly admitted that the Bar is an open profession as well as a liberal one—that every man who is duly qualified, or who can properly qualify himself for it, has a perfect right to try his luck in it. But had we an institution of the kind above referred to, it would very likely see that the Bar was never made a refuge for the destitute—when a person had been obliged to leave any trade or profession it would probably not allow him to hide his former disgrace under a wig and gown. An attorney must, under existing regulations, take his name off the rolls before he can begin to keep his terms for the Bar; there are other rules to the same effect, but in actual practice they appear to be neither equitable nor just: for example, take the rule with regard to a solicitor—if he relinquish his profession by entering a *Government office*, he may then, whilst filling that office, eat his way to the Bar, be called, and thus qualify himself to hold offices which only barristers can fill. We consider this a surreptitious mode of becoming a barrister; it is neither legitimate nor fair to other solicitors; we cannot perceive why a number of Government clerks, whilst so engaged, should be permitted, after eating a certain number of dinners, to come out, like Minerva from the head of Jove, full-grown lawyers. The practice of making barristers in this way, which is quite a common one, is

exceedingly unfair and prejudicial to the junior members of the legitimate Bar. Unfortunately, as things are, the junior Bar can do nothing to lessen such evils; all influence rests with the seniors, and it must be confessed that when men arrive at a certain prominence in the profession they care very little indeed about the struggling mass below; if then, in the press and scramble for wealth and distinction, they ever look back, it is only to shout "The devil take the hindmost." We fancy the Law Amendment Society contains the nucleus of an institution of the description we have mentioned; we wish our remarks may add to its promotion. Should that be the result, the members of the Bar would have a protector of its interests and honour; and in all cases, whether of public harsh treatment or individual wrong, there would be a competent authority for effectually giving the command—" *Fiat Justitia.*" J*.

ART. VI.—ON THE PECULIARITIES OF MARITIME LIENS.

(Continued from p. 222.)

WE have before observed that the rule of law and equity, that the *prior petens* (who obtains a judgment before other creditors, having co-ordinate or equal claims, have brought their actions) shall be paid his debt in preference to the latter, has been adopted in the Court of Admiralty.¹

And it would seem, in that court, that the same rule applies equally to all debts suable there; for I am not aware there does or can exist in that court any analogous distinction between superior and inferior debts, like that which is found and upheld in the courts of common law and equity.

The debts by specialty and of record to which the common

¹ Williams on Executors, part 3, book 2, ch. 2, s. 5; and part 5, book 2, ch. 2.

law awards a preference, and the various peculiar securities which that law considers paramount, are unknown to the Admiralty, and the principles upon which that preference depends are inapplicable to the debts suable in that court. The last-mentioned debts, as they certainly are not debts by specialty or of record, so if they are to come under any category familiar to the common law, can only be considered as debts on simple contract. If so, they of course are of equal degree amongst themselves. If not, they are debts peculiar to that court, and in such case they cannot claim a privilege such as that which has been vindicated to the superior or paramount debts of common law. It is evident, also, on consideration, that there can be no analogy between the case of an executor discharging a simple-contract debt, where there is only a sufficient estate of his testator to pay off a bond debt also due, and the case of the Court of Admiralty selling a *res* at the suit of an applicant *prior in tempore*, who has satisfactorily established his claim, and that, therefore, the same rule cannot be made applicable to both cases. In reality, all Admiralty debts are of the same general nature; but though they thus agree in their general nature, the Court of Admiralty does not hesitate, *when required*, to place or rank these debts in an order of payment graduated by a principle of its own. The Court, however, will only step in to make this collocation when required at the suit of a party; it will not *sud sponte* take exception to a claim of an inferior grade, if no opposition be raised by one of higher rank. On the contrary, the Court, without respect to aught but the suitor's diligence, will enable him to be paid out of the fund which he had placed in its hands.

The *prior petens*, therefore, whatever his claim be, is entitled to the *res*, and to the whole of the *res* should his claim absorb it.¹

¹ In the *Saracen*, which I quoted in the previous paper, p. 220, the point in dispute regarded only a claim of equal degree, and nothing further was determined. But in regard to the other point an *obiter dictum* fell from the late Lord Langdale, in the same suit, on appeal (11 Jurist, p. 225); he said: "It was suggested that the bail bond required on payment of money to a claimant for damage, shows that other claims than those upon which the payment is made have to be provided for, and *perhaps it may be so*: there may be claims paramount, such as claims for wages, and at the

But if no decree has been made, the Court "is bound to consider every claim against the fund (or *res*) in its hands, however

time when the form of the bond was settled, such claims may have been considered to require attention. *The bail bond may, therefore, be well understood as providing for paramount claims.* There seems no reason to conclude that the bond is applicable to claims merely co-ordinate with those of the party who obtained the sentence."

The bond referred to by his lordship is given to the Judge of the Admiralty by the suitor and two sureties, preparatory to the payment of any sum of money arising from the sale of the *res*. The terms of the bond are to restore the sum about to be paid: "In case any person shall come in for his interest in the said sum, and pay the contumacy fees as taxed in the cause, and put in sufficient security to answer the action commenced in that behalf, and for his personal appearance at such times as the same shall be required, and to pay what shall be adjudged with expenses, and to bring into the registry of the court the said sum whenever the Court shall order, and to save harmless the judge, &c., as to the payment of the said sum."—*Tecumseh*, 6 Notes of Cases, 668.

If the suitor elects to wait the expiration of a year and a day before his application for payment, this bond is not required. (*Clerke, Prax. Cur. Admir. tit. 35.*) The intention of the bond has been a subject of dispute, but it seems to be now determined that it is given only to protect the Court, and any parties who shall, within the period of a year (or a year and a day, for it appears uncertain which) from the date of the decree, appear, and prove themselves to be entitled to the *res*, which has been proceeded against, and adjudged as the property of other persons.

In the *Saracen* (2 W. Robin. 453), Dr. Lushington designated this bond as "nominal;" and further observed, "That he was disposed to believe that the expressions in the bond applied exclusively to interests in the subject-matter, as in cases of title." This agrees with the *dicta* of *Clerke* (*Prax. Cur. Admir. tt. 38, 39*): "*Si bona arrestata sint, tanquam bona vel pro debito alterius, si interverneris pro interesse tuo in eisdem,*" &c. The heading of the title 38 is still more explicit: "*Comparatio tertie personæ ad quam spectant bona arrestata, quamvis arrestentur tanquam bona alterius.*"

Notwithstanding the obvious meaning which plain common sense would put upon this bond, an idea appears to have obtained of late years in Doctors' Commons, that there did exist a distinction in Admiralty debts, such as is known at common law, and that the bond was intended to protect the paramount creditor, even in the case of a *res judicata*, and of superior diligence on the part of an inferior creditor. It appears to have been thought that the Court of Admiralty could only make payment of an inferior debt to the suitor, though he were first in the field, conditionally on no other debts of a higher character appearing after judgment. This singular hypothesis, it would seem, has given to the bond the designation by which it is familiarly known to the practitioners of the Admiralty; viz. a bond to answer latent demands. The quotations from *Clerke* show that this misconstruction was unknown to him, and it would seem to be of modern origin. The security mentioned by *Clerke* is not to guarantee the Court and its officers against paramount claims, but to guard against the possibility of the vessel of one person being arrested, and sold as the property of another person, against whom claims existed. The Court in such a contingency would be bound to rescind its own decree, and it thus takes security to enable it to do so with effect. In this there is no infraction

it may have been brought there;”¹ or, in other words, whatever creditor may have initiated the proceedings against it; and then will arise a conflict or competition of the liens, which must be ranked or classified according to the principles of maritime law.

When, therefore, there are several claims against the *res*, and the latter is insufficient to discharge them all, the Court will have to determine the order of succession in which each lien shall be paid off.

The principle of this classification is twofold, and varies according to the nature of the lien. For maritime liens, like all other obligations, arise either *ex contractu* and *quasi ex contractu*, or *ex delicto* and *quasi ex delicto*.²

In the first category are wages, pilotage, towage, salvage, and bottomry-bonds. In the other is damage by reason of collision.

The leading or general principle by which is regulated the priority of one Admiralty debt over another in liens *ex contractu*, is superior merit in the suitor, conditioned, however, as I have intimated, upon coincidence of proceeding. In damage, which is a lien *ex delicto*, the principle is necessarily different.³

When, therefore, many actions are brought against the same *res* at the same time, the Court will place the suitors, and, according as it sees superior worthiness in one suitor over the others, so will it place him in a superior rank—that rank ensuring to a priority of payment. He who has the prior right or lien in law, shall be paid first out of the proceeds of the *res*, and the other must be satisfied with the residue, however insufficient for his demand.⁴

In liens *ex contractu*, this preference or right of priority ostensibly depends upon the dates at which the liens have attached. For the rule by which that priority is determined, requires that the demand or service for which that privilege is claimed be posterior in date to other services or liens. The ground of this inversion of rule is just and obvious. In the hazardous trade of the sea, the services performed at the latest

of the rule of law which makes a judgment, once given, final and sacred; while such a practice as the other would be opposed to *recta ratio* and public policy, by throwing uncertainty upon decisions solemnly given.

¹ *La Constanca*, 10 Jurist, 849.

² *Institut. lib. 3, tit. 14.*

³ *Gazelle*, 3 Notes of Cases, 79.

⁴ *Constancia*, 2 W. Rob. 405.

hour are most efficacious in bringing the vessel and her freightage safely to their final destination. Each foregoing incumbrancer, therefore, is actually benefited by means of the succeeding incumbrance, and the equity of the Court of Admiralty, in adjudicating cases of conflicting liens of this nature, takes that as the principle of its decisions.

Subject to this comprehensive principle in the first rank of liens *ex contractu*, are wages (whether of a seaman or of a master, claiming, under 7 & 8 Vict. c. 112, s. 16), pilotage, and towage. These take precedence of all other liens *ex contractu*, as being a remuneration for services performed in bringing a vessel safely to her haven.¹

But salvage, when it is of a meritorious kind,² and also bottomry (as it would seem), take precedence of the original or antecedent wages.³

As competing with other liens *ex contractu*, a bottomry-bond is not so favourably regarded by the maritime law, for the sender, when he advances his money on such security, looks to a risk, and therefore contracts for a usurious premium. Subsequent salvage⁴ and wages,⁵ and also pilotage and towage,⁶ are consequently entitled to a priority of payment over bottomry,⁷ but of prior wages and salvage it takes precedence.⁸ *Inter se*, the bottomry-bond latest in date is entitled to a preference in payment before an earlier one; and so on, whatever the number of bonds may be, on the principle of law, that without the

¹ *Madonna d'Idra*, 1 Dod. 40; *Lady Durham*, 3 Hagg. 202; *Hersey*, 3 Hagg. 408; *Repulse*, 4 Notes of Cases, 168; *Constancia*, *ibid.* 521.

² *Selina*, 2 Notes of Cases, 18.

³ *Mary Ann*, 9 Jurist, 95.

⁴ *Selina*, *ante*; *Favorite de Jersey*, 2 C. Rob. 232.

⁵ *Madonna d'Idra*, 1 Dod. 40; *Sydney Cove*, 2 Dod. 13; *Constancia*, 4 Notes of Cases, 68.

⁶ *Dowthorpe*, 2 W. Rob. 79. Dr. Lushington (*Constancia*, 4 Notes of Cases, 681-2) says, "By that law (the law of the Admiralty) wages only, and some *small* demands of *equal urgency*, can take priority of bottomry-bonds." The word "small" is also found in the report of the same judgment given in the *Jurist*, vol. x. 850. The learned judge, in the words quoted, evidently makes allusion to towage and pilotage. In 2 W. Robinson's Reports, vol. ii. p. 491, the words are: "By that law wages only, and some *few* demands of equal urgency, can take precedence of bonds of bottomry."

⁷ *Mary Ann*, 9 Jurist, 95.

⁸ *Selina*, *ante*.

repairs effected, or the assistance rendered by means of the last bond, the vessel might have been lost;¹ or (in the words of Sir John Nicholl) "on the supposition that they operate for the protection of all prior interests."

The suitor in salvage is highly favoured by the law, on the assumption that without his assistance the *res* might have been wholly lost. The service is therefore beneficial to all parties having either an interest in or a claim upon the ship and her cargo.

Salvage is privileged before the original or prior wages of the ship's crew, on the ground that they are saved to them as much as, or *eadem ratione quâ*, the ship and cargo are saved to their owners.²

Salvage performed after bottomry has precedence over it, for those persons who take a vessel as a security, take it subject to the incumbrances which the law may impose;³ but subsequent bottomry, as also subsequent wages, have the priority.⁴

¹ Sydney Cove, *ante*; La Constancia, 2 W. Rob. 405, and 4 Notes of Cases, 518; Duke of Bedford, 2 Hagg. 304; Eliza, 3 Hagg. 89.

² Selina, 2 Notes of Cases, 18; Sahira, 7 Jurist, 182.

³ Dowthorpe, 2 W. Rob. 71.

⁴ Selina, *ante*.

In the text I have intentionally omitted all mention of the claim for "necessaries," for it does not appear to be clear in what rank it is to be placed. The 3 & 4 Vict. c. 65, s. 6, enacts, "That the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the necessaries were furnished in respect of which such claim is made;" but it would seem that this enactment does not create a maritime lien upon the vessel. At the same time, however, it appears that the Court of Admiralty will enforce the payment of the demand against the *res*, on the ground that the statute "gives the Court jurisdiction to be exercised in any and every lawful mode which the Court has the power of exercising." Dr. Lushington, in the *Alexander* (1 Notes of Cases, 187), said, "I am not aware that, where the statute establishes a new remedy, new modes of suing must arise after the Act has passed." The same judge, although exercising the jurisdiction *in rem* in these cases, on the authority of this reasoning, said, "The statute does not create a lien at all." This would seem to militate against what was laid down by Sir John Jervis, in the *Bold Buccleuch*, quoted in the former paper: "That in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists." Dr. Lushington also observed, "The Court having jurisdiction would be bound to exercise it equitably, and would protect the interests of every person having a *bond fide* lien on the property, or subsequent purchasers without notice. And here I wish to draw attention particularly to the

The privilege of damage rests upon other ground than that just enunciated. It is given to the creditor, because the law favours him over others for having suffered a wrong—a loss imposed by the *delictum* of others—the master and crew of the vessel in fault.

The damage when recovered operates not only as a civil indemnification to the party wronged, but as a *quasi* penalty also against the wrong-doer; and it is for the public weal that the penalty shall always be enforced, so that such wrong may not, by passing unredressed, incite others to a similar negligence of navigation. And as the law has made it a lien for this principal purpose, so it has for the same reason given it a preference over other liens.

It takes precedence over wages, pilotage, towage,¹ and also prior salvage,² the suitor being entitled to a *restitutio in integrum*. It also takes precedence of prior bottomry, for a bondholder may not take a greater right than the owner had to confer, and the latter hypothecates or conveys his vessel subject to all legal liabilities.³ In the *Aline*, Dr. Lushington has clearly stated the grounds on which this rule rests.⁴ He says:—

“The bottomry-bond might, and often does, extend to the whole value of the ship; if, therefore, the ship was not first liable for the damage she had occasioned, the person receiving the injury might be wholly without a remedy, more especially where the damage is done by a foreigner, and the only redress is by a proceeding against the ship.”

In the same case Dr. Lushington also observes:—

“Another reason, that would incline the preponderance in favour of the person suffering the damage, arises from the consideration that he has no option, no caution to exercise: the creditor on mortgage or bottomry has; he may consider all the possible risks, and advance his money or not as he may think most advisable for his

fact that no lien whatever is established by the Act. Let it not be supposed that in pronouncing for my jurisdiction, or exercising it on the present occasion, I hold in the slightest degree that a claim for necessities, contracted for by the ship four or five years ago, could militate against subsequent owners. I give no opinion upon that point. It may be a question which I am not now to determine, whether a ship, having *bond fide* changed hands, could be liable to any such demand.”

¹ Benares, 7 Notes of Cases, 54, suppl.

² Gazelle, 2 W. Rob. 281; *Aline*, 1 W. Rob. 119.

³ Benares, *ante*; *Aline*, *ante*.

⁴ *Aline*, *ante*.

own interest. He has an alternative, the suitor in a cause of damage has none. In the case of the bottomry creditor, moreover, the risk that is incurred of losing the security, is covered by the amount of the premium he is entitled to demand. As therefore against a mortgagee or bondholder, prior to the period when the damage is done, I think that the successful suitor in a cause of damage has a preferable claim to be indemnified."

In commenting upon the same case in his judgment, in the *Bold Buccleuch*,⁵ Chief Justice Jervis made the following remark :—

"The interest of the bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship, in which he and others were interested, was liable to its value at the date for the injury done, without reference to his claim."

In the *Aline*, the question was the validity of a bottomry-bond made subsequently to damage. The money had been *bond fide* lent for the purpose of repairing the vessel, which had been herself damaged in the previous collision.

Upon this point Dr. Lushington said :—

"The lender, at the time the application is made to him for the advances, could not possibly tell whether the vessel in distress had committed damage or not. He would therefore have to calculate, not merely future contingencies, but to inquire into all past transactions connected with the vessel. The necessary consequence would be a material increase in the amount of the premium. Again, with regard to the case of the person who has received the damage, is not his interest benefited by the vessel being repaired, and enabled to proceed to her port of destination? Is he injured in the amount of his indemnity fund? Not at all. His interest I have already stated is co-extensive with the right possessed by the owners of the vessel at the time when the damage is done, and *his claim is paramount* to the extent of her value at that period. With respect to any subsequent accretion in the value of the vessel, arising from repairs done after the period when the damage was occasioned, his claim to participate in the benefit of such increase of value must depend upon the consideration how that increase arises, and to whom it in equity belongs. Against the owner, who repairs his vessel at his own expense, the claim of the successful suitor would extend to the full amount of his loss against the ship and the subsequent repairs: where, however, the repairs have been effected by a stranger, upon the security of a bond of bottomry, the case is altogether different; and I cannot hold that universally bonds so granted must give way to prior claims of damage."

¹ I quote from the short-hand writer's report, as before.

The decree in this case was, that the owner of the vessel run down (the Panther) was entitled to the value of the other vessel (the Aline) before the repairs were commenced, and to that portion of the repairs which was done after the arrest took place.

It would appear, therefore, by this decision, that as a general rule (subject to this exception of a stranger *bond fide* advancing money for repairs without a knowledge, or the means of knowing the fact of the pre-existing lien) subsequent bottomry is bad.

The exception is one of pure equity, for the Court will not give the lender any part of his bottomry premium.

In the event of the *res* being insufficient to meet all demands, the lien of damage absorbs the liens of wages, towage, and pilotage, leaving those claims, when the owners are solvent, to be settled by proceedings *in personam*. In the same manner the lien of prior salvage, if it has not been satisfied, is absorbed, and the salvors pay the penalty of their want of diligence in not prosecuting their claim when it was recent and solvable. It absorbs the lien of prior bottomry, but in this event the bondholder is not placed in a more hard, or a less fair position than any other speculator, who has calculated and braved his chances of success or failure.

Without infringing upon principle, the Court protects the *bond fide* lender on subsequent bottomry (by whose aid repairs have been effected to a vessel which has committed damage) by prohibiting the successful suitor, in damage, from obtaining more than the value of that vessel, such as it was when the misconduct occurred, leaving the residue to the bondholder in lieu of his advances. But it has never been decided, whether salvage of a vessel, done subsequently to that vessel occasioning damage, is absorbed by the latter lien, or has preference over it.

It will be interesting to determine the relation of the one to the other. The analogy between subsequent salvage and wages, and pilotage and towage, does not hold good, because salvage, unlike either of these liens, cannot be recovered by a personal proceeding, and bottomry, being a contingent and usurious contract, depending upon its own peculiar conditions, stands by itself.

Prior salvage is also out of all similitude, for the suitor, in damage, can, by no sort of reasoning, be considered to have been benefited by the preservation of the vessel which inflicted the *damnum* upon him. Considering the point, therefore, upon its own merits, it may be regarded, in the first place, to be a thing wholly inequitable, that the salvors, being innocent of all share in the injury committed by the vessel, and having been the instruments or agents of her preservation after the lien for damage had attached, and she had thereby become the *quasi* property of the injured parties, should be left without reward or compensation for their pains and risk, perhaps with injury, certainly with great wear and tear of their own property; because if they cannot sue the *res*, they are without remedy for their own damages, and may not sue others for the consequences of their own voluntary act.

They are, therefore, in a worse position than the seamen, pilot, or towers of the vessel; for the latter, as I have said, if they cannot get their wages *ex re*, can always do so *ex personâ*, provided the owners are solvent.

Where, however, the owners of a damaging vessel are insolvent, so that the only fund for the payment of maritime liens is the *res*, upon which they are privileged charges, it would appear (though I can find no adjudicated cases), that the Court would apply a different principle. In the Benares, the Court said :¹—

“In all the cases cited we must bear in mind whether or not the owners of the ship which had done the damage were or were not solvent persons, because questions of exceedingly great difficulty might arise, which I do not mean to anticipate, except by saying that, as questions of towage, wages and salvage, may all be mixed up

¹ Benares, 7 Notes of Cases, 52.—In the *Chimæra* (reported in the “Times” of the 25th November, 1852), the proceeds of the ship and the freight were insufficient to meet a decree of damage; but the seamen, notwithstanding, applied to be paid their wages thereout in the first instance. Dr. Lushington said, “He would not deviate from the principle laid down in the Benares, and rejected the application. He said, that on the principle that parties sustaining a loss, were entitled to be reimbursed out of the proceeds of the ship and freight of the wrong-doer, so far as they extended, and that the seamen had a remedy *in personam*, while by the statute the claim of the *Pickwith* (the other vessel) was limited to the *res*, he was bound to pronounce against the mariners.”

in bankruptcy cases, I do not mean to bind myself by any observation I am going to make on any of these complicated questions."

If, therefore, a different principle, which is not stated, applies to cases where the owners of the ship which has done damage are insolvent, it becomes necessary to inquire what such principle is, and what are the extent and limits of its application. It can be no other than an equitable principle, and its object must therefore be to protect third parties, having a *bond fide* interest in the *res*, owing to their having conferred a benefit, from being left without a remuneration through the all-absorbing claim of damage. But in what way can this be done except at the expense of the suitor in damage? He, therefore, must abate so much of his claim as will compensate those who have preserved what the law has made his own *res*, or have rendered it available to his use by navigating and bringing it home; *i. e.* wages, pilotage, and towage must be paid in the first instance.

But subsequent salvors are placed precisely in the same position—the equity is the same—the injustice of passing them over would be the same.

It is therefore, I think, probable that subsequent salvage would be held to be entitled to be paid before damage in all cases, and wages, pilotage, and towage would be equally entitled in cases where the owners are bankrupt, and the *res* is insufficient to meet all demands.

Besides placing liens *ex contractu* when they are in competition with each other, the Admiralty will also marshal the assets upon which they are secured. The principle of equity known by this name has been adopted in that court and applied to similar purposes, and with a view to similar results.

It is the aim of the Court of Admiralty, as a court of equity, that every claimant on the assets in its hands shall be satisfied if and so far as that object can be effected by any arrangement consistent with the nature of the respective claims of the creditors.

When, therefore, one maritime claimant has two funds to resort to, while another creditor has his security upon one of such funds only, the Court, at the petition of the latter,

will compel the former to resort to the other fund, if that is necessary for the satisfaction of both ; and this principle applies wherever the election of a party having two funds will disappoint the claimant having the single fund ; and accordingly the Court will, if necessary, control that election, and compel the one to resort to that fund which the other cannot reach, and by these means will protect the claimant on the single fund.¹

The Court will apply this principle to the protection of one maritime creditor against another, and will prevent the election of one from prejudicing the claim of another.

In the *Trident*, where there were two bottomry-bonds, of which the earlier was secured on the ship and freight, and the other upon the ship, freight, and cargo, the Court directed the earlier one to be satisfied from the ship and freight, and the later one from the cargo ; and by these means enough was found for the satisfaction of both bonds.²

The Court thus controlled the election of the later bondholder, who would otherwise by absorbing, in payment to himself, the whole of the ship and freight, have defeated the claim of the earlier bondholder, who could not reach the cargo.

In the *Constancia*, there were three bonds, one upon the ship, the second upon the cargo (but by implication of law upon the ship and freight also),³ and the third upon the ship.⁴

There were three funds, therefore, out of which the bonds could be paid, and the question arose from which fund were they to be severally paid, and which had the priority.

The Court directed the latest bond to be paid, preferably to the others, out of the proceeds of the ship ; the other bond upon the ship to be paid out of what might remain of such proceeds ; and the bond upon the cargo to be paid out of the freight and cargo, thus preventing the last-mentioned bond from participating at all in one of its securities—the ship. And upon a further question being submitted to the Court, out of what funds the wages, pilotage, and towage were to be paid, the Court adhered to the principle of its former decision, but directed the wages

¹ Williams on Executors, part 4, book 1, ch. 2, s. 2 ; Toller, book 3, c. 8.

² *Trident*, 1 W. Rob. 35 ; and Monthly Law Magazine, vol. iv. p. 256.

³ *Vide post*.

⁴ *Constancia*, 4 Notes of Cases, 285, &c.

to be paid out of the gross freight, and the proceeds of the ship rateably, and the balance of the proceeds and freight to be first applied to the third bond (on the ship), and the balance of the freight and so much of the cargo as should be necessary, in satisfaction of the second bond—the first bond thus unavoidably, through the circumstances of the case, being left unprovided for.¹

In observing upon this last-mentioned circumstance, the Court said,—

“ Out of what fund are the wages, pilotage, and towage to be paid? I am asked to decree these charges to be paid out of the freight solely. Why? For what reason should I hold the ship exempted? The ship *prima facie* at least, is as much benefited by the services of the pilot and seamen as the freight; but I am desired so to exempt the ship, and exclusively charge the freight, that I may save the holders of the first bond on the ship from total loss, and the holders of the second bond on the ship from partial loss. This is very desirable to be done if it could be done, but if I assent to that prayer, who will be the sufferer? The owner of the cargo. If I am to give it to the one, I must necessarily take it from the other; *but the owner of the cargo can never be affected by any bond till the ship and freight are exhausted, and ought never to be made liable for wages, pilotage, and towage directly.* I am, however, called to do this in favour of bondholders, who have no security on the freight or cargo, and who, by their own act, lent their money without such security; that is, I am called to do that indirectly which I cannot do directly.”

The Court here distinctly recognises the principle of equity, that forbids a fund to be subjected to a claim to which it was not before liable in law.

The *Mary Ann* was a case in which there was a bottomry-bond on the ship only, which latter had also been arrested for wages, and was insufficient to meet both claims. The Court (Dr. Lushington) decreed that the wages should be paid out of the freight, leaving the whole proceeds of the ship available in satisfaction of the bondholder's claim.²

The same or an analogous principle has been applied to the protection of the owners of two or more *res* against the creditor, so that the one owner shall not suffer for the gain of another.

¹ Ibid. 512.

² *Mary Ann*, 9 Jurist, 95. Having mislaid this volume, we quote the case from Mr. Pritchard's Digest; in our opinion, for analysis, condensation, and accuracy, the best work of its class which has appeared.

When a creditor has a double security, *i. e.* upon two *res*, he may resort to *one* of them for the payment of his whole demand, if it be sufficient for his purpose; *but he may only do so*, provided they are both the property of the same owner, and the interests of no third party are compromised.¹ The same creditor loses this freedom of choice if the ship is the property of one person, and the freight is the property of another (*e. g.* by a prior assignment).² In this case the Court will protect one owner, as against the other, by apportioning the debt of this single creditor upon both *res*, so that one *res* shall not be exhausted for the benefit of the other. The principle is, that both the *res* (or their owners) must have been equally benefited, and the one should, therefore, contribute towards the burthen of the other.

In the *Dowthorpe*, the ship and freight formed two funds for the satisfaction of pilotage, towage, wages, and a bottomry-bond. The proceeds of the sale of the ship alone were sufficient to pay off all these claims. But the freight had been assigned, and the ownership of it was in other persons.³

The question, therefore, arose whether the demands should be thrown exclusively upon the one or the other, or on both together, and in what proportion. Dr. Lushington said:—

“I conceive the liability to pay ought in equity, to be governed by the benefit received. He who takes a benefit must bear his share in the burthens. In bottomry transactions, where, as is commonly the case, the ownership of the vessel and freight is in the same person, no question can arise of this description; *but where those interests are severed, the principle becomes applicable.* The ship and freight are both saved or benefited by the bottomry transaction.”⁴

Dr. Lushington was of opinion,—

“In all ordinary cases where the ship and freight belong to different persons, a bottomry-bond should be paid by both rateably.”⁵

He also said with regard to pilotage, wages, and towage:—

“The exertions of the pilot and seamen contribute as much to the realizing of the freight as to the protection of the ship.”⁶

¹ *Dowthorpe*, 2 Notes of Cases, 264.

² *Constancia*, 4 Notes of Cases, 512.

³ *Dowthorpe*, *ante*.

⁴ *Ibid.* 271.

⁵ *Ibid.* 274.

⁶ *Ibid.* Dr. Lushington excepted those cases where freight has been paid beforehand. *Vide*, also, the *John*, 7 Notes of Cases, 64.

In the *Fortitude*, the Court extended its protection to the mortgagees of a ship, by throwing part of a burthen, to which the ship was subjected, upon the freight; forty-eight sixty-fourth parts of the ship (which had been arrested for wages) claimed to be entitled to a certain portion of the freight under 3 & 4 Vict. c. 65, s. 4, and asked the aid of the court to arrest the freight. This was opposed by the master, who was also the owner of the remaining sixteen sixty-fourth parts of the ship, and also by the consignees of the cargo. The Court (though it rejected the application, on the ground that mortgagees could not have an original action against freight under that Act) observed that it reserved the question, whether it would not make the master's sixteen shares not only liable *pari passu* with the other forty-eight, but also to bear, so far as the wages were concerned, that share of the burthen which the freight in equity ought to bear. The Court also intimated its willingness to decree a monition against the master and part-owner, to bring in the freight so far as might be necessary.¹

Besides protecting the owners of a ship and freight, when they are distinct persons, by proportioning the weight of a lien upon each, in the manner which I have before defined, the Court of Admiralty, in the exercise of its equity, has also hit upon a rule which affords a somewhat analogous protection to the owner of a cargo in those cases of bottomry where a cargo has been hypothecated in conjunction with the two others, and the latter are the property of the same person. By means of this rule the Court will direct the order in which all the funds in such a case shall be successively applied. Under such circumstances, therefore, whatever may be the actual order of the hypothecation of the several *res*, as contracted for in the bond itself, the ship must be first exhausted; if that be insufficient, the freight becomes applicable; and should there be still a deficiency, the cargo must then, and *then only*, contribute, and only to the extent of the deficiency, but no more.² The reason for affording this protection to a cargo may be thus stated. It should in equity be only compellable to supply a deficiency in

¹ *Fortitude*, 2 Notes of Cases, 524.

² *Constancia*, 4 Notes of Cases, 287, 512.

the others, and not bear a proportion of a general weight; for the expenses of bottomry relate to the repair and refit of the vessel, and therefore being directly and *primâ facie* for the benefit of such owner's property, his ship and freight should be first applied in the liquidation of such expenses.¹ Accordingly, a bond made upon a cargo alone is valid, upon the principle that the ship and freight are by intendment of law, or by implication, hypothecated along with it; ² "for (said Dr. Lushington) a cargo can never be hypothecated for the benefit of the ship, that is, for the purpose of exonerating the ship from any part of the burthen belonging to her."³

Where a master hypothecates a ship and cargo, it is assumed by law that the hypothecation of the freight, also, was contemplated by the contracting parties, and in such a case the Court will direct the freight to be brought in, and made subject to contribution, although it has not been arrested or even proceeded against, *i. e.* included in the action itself.⁴ Accordingly, whether the bondholder desires it or not, the court will, at the petition of the owner of the cargo (so hypothecated solely), direct the ship and freight, though admitted in the bond, to be applied in the first instance in satisfaction of it.⁵ On the same principle, if the holders of a bond upon ship, freight, and cargo arrest them all, the Court will, on the application of the owners of the cargo, suspend the proceedings against the latter, until, on the ship being sold, and the freight being brought in, it has been ascertained that these two funds are insufficient to discharge the whole of the bond.⁶ It is competent, however, to the bond-holder to

¹ *Constancia*, 4 Notes of Cases, 287, 512.

² *Ibid.* But unless the ship be liable in law, the cargo cannot be. (*Oswauld*, 14 *Jurist*, 96.)

³ *Constancia*, 4 Notes of Cases, 512.

⁴ *Constancia*, 4 Notes of Cases, 520; *Dowthorpe*, 4 Notes of Cases, 84; and the *Prince Regent* cited in it; *Mary Ann*, 4 *Jurist*, 94, 95.

⁵ *Constancia*, *ante*. In the *Constancia*, Dr. Lushington said, "The judgment in the *Prince Regent* has made all clear, for the judge held that the freight was to be called in, though it was not included in the bond, and applied to the liquidation of the bond before the cargo could be resorted to. Now no distinction can, on any legal principle, be made between freight not expressly hypothecated, and a ship not hypothecated, and it was so laid down in that case and in the *Gratitudine*." The case of a bottomry-bond on freight alone does not appear to have ever arisen. (*Constancia*, 4 Notes of Cases, 518.)

⁶ *Bonaparte*, 7 Notes of Cases, 55, suppl.

arrest the cargo in the first instance, as well as the other *res*, in order to secure the whole property over which the bond extends. This limited exemption from liability, which the law confers upon a cargo, has other reasons also in its favour. In the first place, the master is not the servant or agent of the owners of the cargo in the sense in which he is so of the owners of the ship; nor, again, do the interests or necessities of commerce require so imperatively in the case of the one as in that of the other, that he should have an unrestricted and discretionary power to bind them and their property by his own acts.

Hypothecation is undoubtedly one of the most delicate exercises of a master's discretion. If he hypothecates the ship, his object in so doing is to be thereby enabled (when he otherwise could not) to carry on the cargo and earn freight for his owner, *i.e.* to fulfil his obligation to the one and to benefit the other; and if he pledges the freight also at the same time, his reason for taking this step is identical.

But if he bottomries the cargo, he does an act so destructive at the first blush to the pecuniary interests of its consignee, that nothing but the sternest and least-provided necessity can justify and uphold it. By such an act, the ostensible object of which must be to benefit the consignee by carrying his cargo safe onwards, the latter is mulcted not only of his freight, which he must pay under his charter-party or agreement, but in the value also of a portion (greater or less as the case may be) of his cargo itself.

A cargo, therefore, as it can receive no direct benefit from the transaction, and must experience a loss, should, in all reason, be the last contributory under a bond of bottomry. This state of things is consequently in fact and principle wholly different from salvage, where all are benefited alike, and should therefore all contribute equally to support the weight of the remuneration awarded to the salvors.¹

This graduated liability of the ship and freight does not

¹ This is the general rule; but with respect to silver and bullion, when they form the cargo, the Court makes a distinction between the ship and the cargo, on the ground that such cargo is "more easily rescued and preserved than the more bulky articles of merchandise." (*Emma*, 2 W. Rob. 320.)

apply in cases of subtraction of wages. The seaman may elect to arrest the ship, or the freight alone, or he may proceed against the ship and freight together;¹ and it would appear, that if a seaman elects to arrest the ship alone, a mortgagee of that ship cannot compel the freight to be brought in to the Admiralty in order to contribute towards the payment of the wages.²

If the ship and freight belong to the same owners, it is indifferent out of which property the seaman pays himself, or whether he does so out of both.

The same reasoning applies in the case of damage.

It will have been seen, that in the preceding remarks we have principally drawn our authorities from the reported judgments of the present President of the Court of Admiralty. The vast increase of business which that court has enjoyed of late years in its civil department, has compelled, and enabled that eminent judge to construct a system of more extended equity than was either required by, or was applicable to, the cases which were submitted to his court at a former period. What his great predecessor Lord Stowell did for the law of Prize, Dr. Lushington (*vir ejusdem musæ*), has done for the equally complicated, though less agitating questions, which beset the mercantile community in the time of peace. The same characteristics of an acute and luminous intellect of the highest order, combined with the acquisition of profound and varied learning, distinguish the judgments of both, and their reader is constantly charmed by the discovery that in the productions of such men, a rule of law can be identified with a principle of morality, or a maxim of public policy.

H. C. C.

¹ Fortitude, 2 Notes of Cases, 517-18; Margaret, 3 Hagg. 238.

² Fortitude, *ante*.

ART. VII. — REPORT OF THE COMMITTEE ON CRIMINAL AND DESTITUTE JUVENILES.

ON the 6th of May last an order was made in the House of Commons, "That a select committee be appointed to inquire into the present treatment of criminal and destitute juveniles in this country, and what changes are desirable in their present treatment, in order to supply industrial training, and to combine reformation with the due correction of juvenile crime."

The committee, with Mr. Baines, the present Poor Law President, for chairman, was formed, and on the 11th of May they commenced their work. During that time they examined twenty-nine persons, who, either from the nature of their professions, or experience among the lower and dangerous classes, were well calculated to give the committee the necessary information and details. The majority of them have turned their attention especially to the improvement of schools and establishments for criminal and juvenile offenders; and have, together with that praiseworthy benefactress to her country, Miss Carpenter, given most valuable information, not only as to the state of existing schools, but have also given suggestions for the improvement of these establishments.

The majority of the witnesses bear testimony to the utter inefficiency of the present system for the efficient reformation of that class with whom we are now dealing, called the dangerous classes, who are below in morals many of the poor in our workhouses.

Of their education little need be said at present; for the education they have had has been generally such as to aid and abet their wickedness, having had no training in industrial pursuits, and still less in heart and character.

Let us now see in what respect the education given in our present schools is inadequate for the particular class of children who are the objects of the inquiry. Children who have passed their

lives in wandering from street to street to seek a subsistence, and then from one gaol to another, will not, we apprehend, be likely to learn much good from, or relish mere reading and writing. They must be taught the useful arts of life, in order not only to take interest in what will elevate their minds, and in that way improve their morals, but learn to get their living by their own honest industry, and thus be made to value it. This the ordinary class of schools never teach them. But were there such schools, the best adapted to the necessities of this class of children, they would not be allowed to associate with those of the respectable and independent labourer. And the result is, that until establishments expressly designed for them are created, we shall have this *incubus* preying on the community.

The class in question consists mostly of the children of reprobate parents, who have sent them into the streets either to steal or beg, and who, for any kind of detected offence, are sent to gaol. When these children have followed this course of life for some time, they are so enamoured with it, that a more respectable livelihood would at first be irksome to them; and even when they are induced to turn their attention and hands to other and fitter objects, they exhibit a sort of inanity and inability to use not only their minds, but even their fingers; and in this latter respect very much resemble the children in some of our workhouses, who are often masses of stolidity and disease.

Mr. Power, Recorder of Ipswich, justly says,—

“The child, committed for a first offence, differs little from a pauper child.”

There is no doubt that many of these poor children are instigated by the parents to commit crime, and others are driven to it by the drunkenness and ill-treatment of their friends; and many, again, think that in thieving they have not broken any law, except the law of the land, which they are trained to have a pride in violating and evading its penalties.

Mr. Hill, the Recorder of Birmingham (eminent for his benevolent labours in this cause), says,—

“As a general rule I should say that they consider it a merit as measured by any other law than the law of the land.”

They think, if they are caught, that they are quits as regards crime generally. On this subject Mr. Hill again remarks:—

“They are very much in the habit of considering the retributive penalty, which has hitherto been applied to crime, in the nature of a purchase. They buy the right to commit the offence with the liability to the penalty; and when they have paid that penalty, they and society and their own consciences have arrived at a balance. That is their view.”

The Reverend Sydney Turner, the able Chaplain of the Philanthropic Farm School at Reigate, who also takes deep interest in these criminals, says,—

“I do not know whether it is unkindness or not, but the altered state of the family, the altered state of the home, does seem a very powerful incentive to criminality.”

We will now give some account of the life of these young thieves, furnished by “M. M.,” a witness, who was himself a thief; and on being asked what made him follow that course of life, answered that,—

“Having a stepmother, I was very careless at home, and having companions that way, and my being inclined, all these things combined, which I cannot mention now, led me on. * * * I was sent to prison, I suppose about four years ago. I have been twice in prison. * * * The young thieves in London are generally collected together in gangs. There is always a leader to a gang. There is a rivalry between the gangs as to who can make most money. They were continually quarrelling about which was the best hand. I do not think most of these boys were led on by poverty. I think more was for mischief than anything else: if their parents would have paid attention to their children, they would have minded them.”

Miss Carpenter, who had “been in the habit of visiting the families of the lower classes for seventeen years,” says,—

“In the children of our school there are many who have been known for a length of time to be thieves, and who have been in the constant habit of pilfering. They have not been apprehended, it is true; but I do not consider them as worse after they have been apprehended than they were before, excepting only the brand which is attached to them by society. * * * In the year 1850 there were twenty-five boys who were convicted of theft in our school. Of these twenty-five boys, every one has fallen into a vicious course, except those few over whom we had obtained a moral influence, and for whom we made efforts as soon as they came out of prison. * * * One little boy is mentioned in the police reports in the year 1850, as already ‘a most hardened character;’ he had been then two or three times in prison; he was then nine years old. During the next

summer he was three times taken up within a few months. * * * The child was removed, through the kindness of Mr. Turner, of Red Hill, to the Philanthropic Establishment last summer, and I hear that he does not show any decidedly criminal propensity; idleness being his chief fault. That little boy's brother, A. S., was three years ago an accomplice of a youth, older than himself, in house-breaking. That youth was transported, and this brother was allowed to turn Queen's evidence. He was not in the slightest degree deterred. Others of his companions have been transported; he has continued in the most determined daring, often escaping conviction by his extreme skill, and when imprisoned becoming only harder after. His character among his associates may be learned from this fact: on one evening he was in school, the master was exhorting them on the subject of the future life, and the consequences of sin; the boy next to him said, 'If any one will go to hell, you will,' which he received as an acknowledged fact. That boy is now committed for felony. He has not been deterred, but rather hardened. I might cite numerous similar instances."

And so will it ever be, if we keep on only telling a child how wicked and naughty he is, without ever leading him to better things, by trying to encourage him and teach him what is right. Many have thus been lost by hearing incessantly of their evil ways, for they believe nothing can save them, and therefore they become reckless, and do not care what crimes they commit.

Mr. Ellis, shoemaker, and industrial master of Brook-street Ragged School, says,—

"I commenced with three lads, and taught them shoemaking. * * * I have a lad now, working at my place in Stebbington-street, who had been confined nine days in the black-hole in the Pentonville prison. * * * One of the three lads had been convicted of crime several times, and had been whipped: the other two were not so criminal; they were beggars; they were destitute lads. Our committee was not favourable to the view of taking the criminal class. It was my act entirely in taking the criminal class. I spoke to Mr. Platt about this lad, who was in Trafalgar-square at the time of the Chartist riots. It was on a Tuesday night, in 1848, he came to the school, and I began talking with him, and we then got into conversation about his former life, and I then found that he was desirous of leaving off his former habits; he had been a very bad character, and he said that if he could find a friend that would assist him, he should like to go to work; that he was willing to go to work, and that he was willing to leave off his former habits. With this lad and with two others, who were not so criminal, we commenced our class, in the month of April, 1848, and our committee was so satisfied with the result of that experiment that on the 15th

of May they added two more boys, and on the 4th of December the number amounted to fifteen. I undertook the management of these boys."

Upon Mr. Ellis being asked if at first these three boys had any moral sense, he answered,—

"No; when I first took them they did not know right from wrong. When Miss Carpenter came to speak to one of my lads, she said to him, 'Don't you think it is wrong to steal?' He said, he thought it was right. She then asked him, 'But were you not afraid of God?' He said, he did not believe there was a God. She said to him before she left him, 'Would you steal now if you were to leave Mr. Ellis?' He said, no, he would not. I endeavoured to convince those lads that honesty was the best policy, in my conversation with them whilst I was at work, and that they were responsible beings. * * * My principal object always was with those lads to put in their power the means of getting a living, by teaching them a business. With regard to their morals, I thought I could not do better than set them a good example; and I ate with them, and drank with them, and slept with them, and I associated myself with them in every way, and, as far as religion goes, I showed them the law of the Gospel as well as I could. I am not much of a scholar myself, and therefore I could not cultivate their intellects much."

We see now how much may be done even by the poor themselves towards the reformation of these young criminals. Oh that many among us would follow the example of this poor but noble-hearted shoemaker, instead of expending their energies on questionable benevolences and costly missions to the antipodes; but with many, we grieve to say, the farther off the object the greater is the interest.

Mr. Power gives some very sad, but most interesting, accounts of the ways and habits of thieves, some of which he had obtained from Mr. Ellis, whose treatment the Recorder says, "is above all things satisfactory." He then begins:—

"When these boys were called together A. was the first to rise and speak. He said, he was truly grateful that he was where he was that night. At the age of seventeen he found himself in possession of 1,700*l.*; father and mother dead; he was then living in the public house in which he was brought up. This money he spent in seven months; then borrowed as much as he could of his sister; robbed everybody he could during eighteen months; and was at last detected in robbing a pawnbroker of property to a large amount; was convicted and transported to Gibraltar for ten years. He said, he was now determined to lead an honest life, although he had met his old companions, and he 'knowed' of a plant that night of 50*l.*;"

but, added he, 'my lads, we can't lay down happy all night, you know it as well as I do, when we go on so; let us all like one stick together, and do the thing that's right.' He was followed by two or three others, who gave the histories of their lives; and after this, this little band of thieves formed themselves into a society; they made rules and they established fines; one of their fines was that a ~~slave~~ should be stopped from the meals that were given to them; they prohibited smoking, swearing, or being dirty after nine o'clock on the Sunday morning; in fact, as far as possible, they were a self-controlling community. * * * A. is now living with a gentleman, Mr. Engell, 15, Euston-square, as servant, and has been nearly two years there, with the greatest credit to himself and the school he belongs to; is a teacher in the school, and everything we could wish. I believe that that gentleman, on being referred to, would say to any person that this returned convict is a servant in whom he reposes the highest confidence—he is coachman there. B. is getting his living by wood-chopping, and we have an excellent account of him from his landlady for honesty and industry. This young man had been in prison fourteen times, at the station-house thirty, and admitted that he was not detected once in twenty times. His master now tells me that he has so established his character that he can borrow 2*l.* or 3*l.* of his neighbour in case of receiving a large order to execute; he is now living at Fitzroy-place. * * * Every one of those boys at the present moment is getting is living in an honest way, and without being the slightest expense to the community."

We cannot read such evidence as this without incurring a grave moral responsibility. Can we, with safety to ourselves or others, leave one stone unturned whereby we may assist in elevating the minds and morals and thereby reclaiming these poor creatures? Let us not forget that, in doing so, a benefit is conferred on society at large. If we neglect *them*, we not only neglect our own duty, but are imperilling our own safety, and that of society at large; for let us rest assured, that if the incipient vices of this large class be not nipped in the bud, they will go on increasing till they will be too strong for us, and will at the first instigation be ready to join not only in acts of plunder, but in confederacies for any kind of war on the peace, order, or property of society.

The causes of crime are so numerous that Mr. Hill says,—

"I could not make, and perhaps I should not profitably employ the time of the committee by attempting, a complete enumeration of them; but I will point to some, and I will point to some that are in augmenting operation. Let me first draw the attention of the committee to the augmenting magnitude of our towns, as containing

within itself a great source of crime, both adult and juvenile. A century and a half ago, as far as I have been able to ascertain, there was scarcely a large town in the island except London—when I use the term large town, I use it with reference to the subject under hand—I mean where an inhabitant of the humbler classes is unknown to the majority of the inhabitants of that town. * * * I think it will not require any long train of reflection to show that in small towns there must be a sort of natural police, of a very wholesome kind, operating upon the conduct of each individual, who lives, as it were, under the public eye; but in a large town he lives, if he chooses, in absolute obscurity; and we know that large towns are sought by way of refuge, because of that obscurity, which, to a certain extent, gives impunity. * * * The magnitude of towns and the separation of classes, have acted concurrently, and the effect has been, that we find in very large towns, which I am acquainted with, that in certain quarters there is a public opinion and a public standard of morals very different to what we are accustomed to, and very different to what we should desire to see. Then, the children who are born amongst those masses, grow up under that opinion, and make that standard of morals their own; and with them the best lad, or the best man, is he who can obtain subsistence, or satisfy the wants of life, with the least labour, by begging or by stealing, and who shows the greatest dexterity in accomplishing his object, and the greatest wariness in escaping the penalties of the law; and, lastly, the greatest power of endurance and defiance when he comes under the lash of the law. * * * A very potent cause of crime, especially of juvenile crime—and I speak here from actual experience—a very large per-centage of all the thefts committed in Birmingham are thefts of property exposed at the doors of shops for the purpose of attracting the attention of customers; and I very much doubt whether, in the state of moral ignorance in which a large portion of our juvenile population unfortunately is, whether a temptation of *this* kind does not arise—that they hardly recognise objects put in this dangerous position as belonging to the real owners; whether they do not consider them something in the nature of waifs and strays, which it is not quite so wicked to take hold of as if the property were under better control. But whatever the motive is, there is not a doubt that a very large per-centage of the thefts of Birmingham, and I believe of every other large town, judging from the complaints which Recorders are in the habit of making of shopkeepers so exposing their property, is to be attributed to such exposure.”

Miss Carpenter says on this subject:—

“I believe that juvenile crime is entirely arising from the lowest class, and that in considering the provisions proper for the correction of juvenile crime, we must somewhat consider the condition of the whole class. I have heard before your honourable committee several causes which are incitements to juvenile crime, and, I believe, all of them to be very important. * * * I believe that the low sanitary condition of this part of the population is one of the causes of

crime, and that among them are facilities afforded for dishonesty by the pawnbrokers, by the marine store keeper, and also by individuals who cannot be recognised by the law, but who receive stolen goods from the children; and, besides, the immense number of places for unlawful amusement to which they have access unrestricted. I consider all these to be strong incentives to crime; but I believe that they could resist them if they had within them that moral principle which would guard them against yielding to temptation, and that they are entirely without."

Mr. Ellis, in his evidence, says, in speaking of the boys in his industrial class, in Brook-street school:—

"I thought that one cause of their crime was want of employment; they had never been used to work, and no one had ever taken them by the hand to train them in the way of work. I employed them at shoemaking, and I made that employment of shoemaking as amusing to them as I possibly could, and I found that the boys were very fond of making things themselves, such as shoes. I used to go and sit with them for two or three hours a day, and I used to tell them that they might, by governing their tongue, and governing their tempers, and governing their appetites, and governing themselves generally, be much more happy if they would put themselves in harmony with the laws of their own physical nature; and I showed them how wrong it was to break the social laws that bind society together, and also the laws of God."

Mr. MacGregor, in his evidence, gives, in some degree, the same reasons as the cause of crime as those given by Mr. Hill and other witnesses. He says:—

"The chief cause of all, I consider to be the want of sanitary accommodation, which turns out all the youth of our large cities continually into the streets, and prevents them from having any home; compels them to resort in wet days to the beer-house, and in ordinary days to places where they meet in large numbers, and either gamble and do other things injurious to themselves. Our vicious publications are another important cause. * * * I have seen generally in a criminal court, the most hopeful cases of evidence given of a desire to reform, on the part of those boys who have been led into crime by the exposure of goods, and I should therefore judge, that that is a temptation which may overcome many who are not depraved."

Mr. MacGregor, in speaking of the facilities afforded for the disposal of stolen goods, says he thinks—

"A very great inducement, and especially a present incentive to dishonesty, exists in the betting-houses. We have found that some betting establishments have even employed our messenger-boys."

Having cited this sad but interesting picture of the lives and

habits of young criminals, and of the evils with which we have to cope, let us turn to the proofs the report contains of the total inefficiency of all existing means for subduing it. And first, as to the correction applied by the law.

Mr. Hill says:—

“I am afraid that experience has but too clearly shown that the law in its present state is ineffective to the purpose, * * * I really think it may be shown by theory as well as practice to have failed, and that if the subject is duly considered, it would appear very astonishing if it had succeeded. We proceed upon the retributive principle; the heavier the offence, the heavier the punishment. The operation of that, at all events, upon young persons, is not happy with regard to their reformation, and not happy, I think, looking at it as deterring others. I think it answers therefore neither of the great ends of punishment. It does not prevent the criminal from repeating his offence, and it does not, by way of example, deter others from imitating his conduct. A young person is brought before a magistrate, or a judge, or a recorder, as the case may be; we hear that it is his first offence, by which we mean his first detected offence; but he must be a very unfortunate person indeed if it is his first offence; that is, unfortunate in their view of looking at it. In consequence of his youth and of its being his first offence, he has a short imprisonment, a fortnight, we will say. Now, what is the operation of that imprisonment? If he had any dread of a gaol, from not knowing the place, in the course of a fortnight he loses that dread; he knows exactly what it is, and that, at all events, he is comfortably housed and well fed, and the term is not so long as to make the loss of liberty very sorely felt. He is also, and he knows it perfectly well, stigmatized as having been in gaol; he has therefore passed out of the brotherhood of what our old law calls ‘the true men,’ and he has become one of the criminal portion of society, and that he knows, and his attention is very likely to be turned towards his new colleagues; he looks to them as an example, and resolves not to go to work and be an honest lad, but next time to steal with more dexterity, so as to avoid detection; he also resolves to bear what he finds can be borne, with as much patience as he can bring to the task, looking forward to enjoyment when he shall come out again. This lesson is repeated from time to time; he is never therefore a sufficient period to bring him under the operation of a reformatory system, even if a reformatory system could be perfectly applied in a prison, which I think it will be found it cannot be. Under these circumstances, are we surprised that these lessons result in teaching him endurance of the penalties of the law, without any reformatory action upon his mind, and that he should now become a confirmed criminal? I rather think we ought to be surprised that they should be expected to have any other effect.”

This subject is well handled by Mr. Power, Recorder of Ipswich, who said in answer to the question :—

“ Does the present system of treatment of juvenile crime in this country appear to you to be defective in many particulars ?—Entirely so. I cannot illustrate it better than by mentioning what I felt compelled to do in Ipswich. So strongly do I feel the evil of committals for short terms of imprisonment, that one of the first steps I took was to call some of the principal inhabitants of the borough together, with a view of establishing, if possible, an institution in which we might get together the children after they came out of gaol, in order that they might be reformed. The very fact of the recorder of a town, whose duty it is to commit young prisoners to gaol, feeling it also a part of his duty to get an institution established by which he could do away with the ill effects arising from the sentence he is compelled by law to pronounce, argues very strongly against the expediency or justice of the present system. * * * One defect is the custom of awarding short sentences of imprisonment. Another objection that I have is this, that reformatory treatment in a gaol is perfectly impossible ; for this reason, that the genius, if I may say so, of gaol discipline is the restraint of the individual ; and what a convicted child wants is not to be restrained, but to be given a character in himself, by which he may be able to resist the temptations to which he will be exposed when he leaves the gaol.”

Having seen from this valuable evidence, the leading causes of crime, and the inadequacy of the present system, we must look further, and ascertain if some fitting remedy cannot be suggested for the mental and moral training of the criminal and destitute juveniles.

Reformatory schools, expressly designed for the purpose, seem to be generally considered the only effective means of grappling with and contending against the vices of these unfortunate children. They must be *penal* as well as reformatory.

We hear of the effects produced by the system pursued in the Massachusetts Reformatory School, the New York House of Refuge, the Rauhe Hans Reformatory, and the Rhusslede Institution, and others of the same description ; but we need not travel so far to find the blessings of such institutions, but can look at the good that has been effected by the penal colony at Mettray, the Aberdeen Industrial Feeding School, the excellent Philanthropic Institution at Reigate, our own Ragged Schools, and some of the District Pauper Schools, such as the North

Surrey, Norwood, and Qualt, which we rejoice to say, are spreading, though slowly, in different parts of the country.¹

The following Bill, drawn, at the request of the chairman, by Mr. Symons, suggests a remedy :—

That it is expedient to make better provision for the reformation of juvenile offenders under the age of sixteen years, in fifteen of the most populous counties in England, and to remove them wholly from further imprisonment in the common gaols.

1. That it shall be lawful for the Lords Commissioners of Her Majesty's Treasury to set apart and appropriate a sum not exceeding 150,000*l.*, from the Consolidated Fund, for purchasing land and erecting and fitting suitable buildings for the purpose of the said schools.

2. That the selection of proper sites, and the erection of the said buildings, and superintendence thereof, be under the immediate authority and control of Her Majesty's Secretary of State for the Home Department.

3. That the said Secretary of State shall, in certain of the most populous counties of England, to wit, Middlesex, Lancashire, Cheshire, Devon, Durham, Gloucestershire, Kent, Norfolk, Somersetshire, Staffordshire, Surrey, and Yorkshire, cause a suitable site to be taken, and buildings for a school and farm, as hereinafter described, erected, for the establishment of fifteen of the said schools in the said counties, two whereof to be in Middlesex, Lancashire, and Yorkshire, respectively.

4. That each of the said school buildings shall be constructed to hold from 350 to 450 children of both sexes.

5. That a portion of the building be constructed on the most approved models, for detention in separate cells, and for the carrying on of hard and irksome labour therein.

6. That the remainder of the building be adapted for a large boarding-school, with dormitories, and fitted in the homeliest manner.

7. That outbuildings be erected for the ordinary offices, and also for the purposes of a small farm, together with sheds for shops, inclosed in yards.

8. That provision be likewise made for dairy-work, baking, washing, ironing, and for instruction therein to the female inmates.

9. That the Secretary of State also cause land to be rented or purchased by money raised by loan, to the extent of not more than twenty-five acres for each school, to be cultivated by the labour of the inmates.

10. That on the first day of the General Quarter Sessions of the

¹ We are glad to find that a public meeting is convened at Birmingham for the purpose of establishing a new penal and reformatory school there, under the auspices of Lords Calthorpe and Lyttelton, and Mr. Adderley and others.

said counties, holden next after Lady Day in every year, in each of the counties aforesaid, the justices assembled thereat shall elect a number of fit persons, equal to the number of Poor Law Unions in the same county in which the said school is established, to be members of a Board of Management of the said school for the ensuing year, provided that no person shall be so eligible as aforesaid, unless he be then actually rated to the relief of the poor within the said county, to the net annual value of one hundred pounds.

11. That each Board of Guardians, at its first meeting after its election at Lady Day, in the said counties, in each year, shall elect one fit person to be a member of the said Board of Management for the ensuing year, provided that no person shall be eligible unless he be then actually rated to the relief of the poor in the said county to the net annual value of fifty pounds.

12. That the Board of Management so elected as aforesaid, shall meet not less than once every three weeks at the school.

13. That the officers of the said establishment shall consist, at least, of a governor or matron, a schoolmaster, schoolmistress, and a chaplain of the Established Church, being first sanctioned by the Lord Bishop of the Diocese, a medical attendant, and a clerk and auditor, together with a fit person to train the inmates in morals and industry, for every twenty-five thereof; which number of inmates shall be grouped, and placed under the special charges of one of the said trainers, as well by night as by day.

14. That the appointment of all the said officers, and such subordinate officers as may be required for the establishment, shall be vested absolutely in the said Board of Management; but they shall not dismiss the master, matron, schoolmaster, schoolmistress, chaplain, clerk, or auditor, without the consent first had and obtained of the said Secretary of State for the Home Department.

15. That the magistrates in Petty and Borough Sessions, and the courts of Quarter Sessions and of Assizes, shall, in the abovenamed counties, commit all juvenile offenders, after a certain day, to be fixed by the Secretary of State, whether before or after, to the said prison schools, instead of the county or city gaols.

16. That for all felonies whereof the said offender shall be convicted, whether summarily or after trial, and any other offences now punishable by transportation, the sentence or term of imprisonment shall in no case be less than twelve calendar months, or more than three years; and for all minor offences not now punishable with transportation, for a term not less than six months, and not exceeding eighteen months.

17. That it shall be lawful at any time during a term of sentence, for Her Majesty's Secretary of State for the Home Department, on the recommendation of the said Board, either wholly to remit the same, or to suspend the remainder thereof for a certain definite number of years, during which period the said suspended sentence may be at any time restored, and be put in full force against the same offender, on his conviction of any fresh offence whatever against the

law ; and at the expiration of the said period, the said sentence shall wholly determine.

18. That for a period to be regulated by the said Board, every offender after conviction shall be subjected to a correctional stage of discipline in separate confinement, with hard, irksome labour, and diet as low as shall be in each case consistent with the health of the inmate.

19. That after the expiration of the said period of correctional discipline, the offender be placed in one of the said groups in the general school, and allowed to associate with the other inmates.

20. That the discipline in school be mild and firm, having a constant aim to produce reformation of character, and to encourage it.

21. That the instruction taught in the school-room consist of the principles of the Christian religion—reading, writing, and the elements of arithmetic, and other useful practical knowledge to be given for a period not exceeding three hours daily.

22. That the entire religious instruction shall be under the control of the chaplain, subject to the provisions with respect to religious scruples contained in the 7 & 8 Vict. c. 101, s. 43, for which like provision shall be made.

23. That the inmates shall, during the remainder of the day, saving at meals and time for recreation, be trained in the practice and study of systematic industry, of which spade husbandry and useful handicrafts shall be the staple occupation for the boys, and needle and household and dairy work for the girls, under the constant superintendence of the trainer.

24. That the said industry shall be adapted as far as possible so as to diminish and defray the expenses of the maintenance of the inmates.

25. That it shall at any time be lawful for the said Board or the governor to replace any inmate in the correctional stage of discipline, on misbehaviour, and to detain him there at the discretion of the committee.

26. That the said committee be empowered to frame bye-laws and regulations in furtherance of the foregoing provisions.

27. That Her Majesty's Inspectors of Prisons and Her Majesty's Inspectors of Schools, shall at all times have free access to the establishment, and report thereon to the heads of their respective departments.

28. That Her Majesty's Inspectors of Prisons shall be empowered to suspend the execution of any such bye-law or regulation as aforesaid made for the management of any part of the establishment save the school, until the same shall have been allowed or disallowed by the Secretary of State.

29. That Her Majesty's Inspectors of Schools be similarly empowered to suspend the operation of any such bye-law or regulation having reference to the management of the school, until such bye-law or regulation shall have been allowed or disallowed by the Lords of Her Majesty's Committee of Privy Council on Education.

30. That the salaries of all the school teachers and trainers be defrayed by grants of the said committee of council, to be regulated from time to time by examinations by one of Her Majesty's Inspectors of Schools, under regulations to be framed by the Lords of the said committee of council.

31. That all the expenses of the said establishment not herein before provided to be paid by grants from the said committee of council, be assessed according to the average actual expenditure, inclusive of establishment charges per head on each inmate, estimated by the quarterly average thereof, preceding each current quarter, and that the amount thereof be the payment to be made to the said committee in supporting the expenses of the said establishment.

32. That the said sum per head shall be levied on and recoverable from the common fund of the union wherein the offence took place, for which each inmate was committed, according to the powers given for the recovery of like repayments in support of district parochial union schools, by the 7 & 8 Vict. c. 101, s. 46.

33. That every such union so charged as aforesaid, shall have full power to recover the said payments during the whole term of the imprisonment for each inmate chargeable to it, from his or her father or stepfather, by order of any two justices of the peace, according to and by the same powers as are now given by the 7 & 8 Vict. c. 101, ss. 2, 3, and 4, as far as the same are applicable, for the recovery of the costs of maintenance from putative fathers of bastard children, together with the same powers of appeal against such order, by the party charged therewith.

34. That for the purpose of proving the chargeability of such inmate on such union, a certificate purporting to be signed and sealed by or on behalf of the said committee of the penal school, shall be sufficient evidence; and that the only additional evidence required for the making of the said order shall be evidence of such parentage as aforesaid.

35. That it shall be lawful for Her Majesty's Secretary for the Home Department to license under his hand and seal any similar establishment for the correction and reformation of juvenile offenders founded by voluntary subscription; and to confer on them any or all of the powers given by this Act to the aforesaid county penal school, and to authorize the commitment of juvenile offenders thereto, within such districts and under such regulations for the due management thereof, as may seem to him from time to time expedient.

36. That it shall be lawful for Her Majesty's Secretary of State for the Home Department, to permit juvenile offenders convicted in counties adjacent to those hereinbefore named, to be committed to the said penal schools, on such terms and conditions as he may think fit.

The following is the account furnished by the Rev. Sydney Turner, resident chaplain of the Philanthropic Farm School, at

Red Hill, with which society he has been connected eleven years. He says, in his evidence :—

“The society has two great objects in view; the one the individual reformation of the children it receives, and the second, the amelioration of the condition of that class of children generally, * * * Its main function is the practical reformation of the individuals whom it receives. Those individuals consist of three or four descriptions; there are the boys who come to the school more or less of their own will; then there is the class who are sent to it, being sentenced to transportation, and receiving a conditional pardon, these are compulsory inmates; and there is a third class, who are placed under our care by their parents or immediate relatives, who pay so much a week in most cases towards their maintenance.”

When this evidence was given by Mr. Turner, he said,—

“We have now fifty-two of the voluntary class and thirty-eight of the young transports under conditional pardon, sent by the Government from Millbank, and twenty-four who are partially paid for by their relations or friends.”

In this institution the boys not only are employed in agricultural labour, but there “is sufficient carpentering and smith’s work, shoemaking and tailoring,” to give them an idea of making themselves practically useful, though they are not taught as trades. They have sent many boys from this institution to the colonies, some of whom have turned out well and others the reverse, which must be expected from such a number going out and “forming friendships on board in the long voyage.” The boys at Swan River sent a remittance “of £20 to this society as a subscription, stopped by consent from their wages.”

“Emigration,” said Mr. Turner, “is held out as a premium to the boy, which he must earn by his good conduct, industry, and proficiency.”

They are never allowed to emigrate till they have been twelve months in the establishment.

Besides Mr. Turner, who is not only employed as chaplain, but as secretary and general governor, there is a schoolmaster and an assistant schoolmaster, a matron or housekeeper, who superintends all the clothing and cooking, a female cook, and a baker. There is also the bailiff, and five labourers, namely, a carter, a cowherd, and three working men; they have also a

gardener, whose wife is employed in the needlework required in the house, there not being any girls.

The daily routine is as follows :—

“Eight hours,” says Mr. Turner, “are occupied in manual and field labour. In the summer the boys rise soon after five, and having made their beds and put their sleeping-rooms to rights, go to work at six; they leave work at eight; from eight to nine they wash, breakfast, and attend prayers in the chapel; from nine to twelve they are at work or in school * * * they leave work at twelve and dine; at one o’clock work is resumed, and continues till half-past five; the boys who do not attend school in the morning come up for instruction at three in the afternoon; at six they sup; at seven, they have reading, singing, and prayers, being in bed at eight.”

Having given a slight sketch of the daily routine followed at the Philanthropic, we will, in as brief a space as possible, see what system is followed at Aberdeen, though it is not so much reformatory as preventive. They are taught reading, writing, arithmetic, and Scripture history daily. In the boys’ school tailoring and shoemaking are taught; they are employed in picking hair for upholsterers, picking oakum, and in making fishing-nets, which is a most lucrative source of employment. The girls learn knitting and sewing.

We will close our accounts of these institutions with a brief description of Mettray, as furnished by Colonel Jebb :—

“I do not think the details of Mettray are generally adapted to the English character; French boys are different to ours. M. de Mettray admitted that it was so, and that French boys were influenced by different considerations, and such as might not have much weight here * * The chief element in their plan is the division of boys into families, and the association with those boys of masters and officers selected, and who are their instructors. Certain prisoners are also selected and placed in authority. I do not think that we should get officers who would live, and dine, and identify themselves completely with the boys as a family; and it would be at present a violation of the law to place any prisoners in authority over others; that, however, might be easily got rid of. I think we might possibly employ, to a certain extent, the services of some of the best boys in endeavouring to do good amongst the others. They are quite capable of it.”

We must not close this subject without alluding to one very important point, namely, the punishment and correctional discipline to be enforced. The Rev. Sydney Turner says, that at Reigate there is very little corporal punishment allowed. He

rarely permits it, and prevents it as much as possible. When first he went there, he always punished them himself. He says, they do not have it once in six months. He says, "Anything like a formal flogging could not be administered without my express leave."

Here we have conflicting opinions, for Colonel Jebb, surveyor-general of prisons, is in favour of corporal punishment, as he looks upon it as a mean of deterring crime. At the same time, he says—

"Whipping is, however, an element of discipline that should not be lost sight of. I am not at all an advocate for its use beyond the power that it exercises in deterring, and acting upon a boy's fear. * * * I think a whipping with a birch-rod, combined with a short period of solitary confinement, would have a deterring effect, if administered for a first offence especially."

For our own part we would rather have a correctional period and a correctional department. We would have them confined in cells, and hard labour while there. By hard labour we do not mean weaving, tailoring, and shoemaking, as at Pentonville, but what would be really distasteful to them, such as turning a winch.

Mr. MacGregor says, that the first week of punishment produces a beneficial "effect," and that "*separate, not solitary, confinement*" would be sufficient as a punishment introductory to reform. We do not agree with Colonel Jebb, who, in addition to the week's confinement, advocates the use of the birch-rod. We think that this only tends to harden their nature and render them more obstinate. It should be only adopted in extreme cases, if at all. Mr. Power differs both with us and Colonel Jebb, and thinks that no punishment at all should be inflicted before the reformatory treatment commences. To the words reformatory treatment many may attach a harsh idea, but, far from it, we wish to lead these poor children to think and reflect on what they have done, and by this reformatory treatment to let them see that they are not uncared for.

We hear people talking of our gaols being too comfortable: let us look at the evidence given by a thief, and see if that place can really be called comfortable where he says, "there were no attempts while we were in prison; there were no more than the

rules," which are read to them, and they are harshly treated. And he again says, "These is nothing like reformation such as I should prefer going on there;" and he adds that, "the treatment young criminals receive in prison does not tend to reform them."

Can a place be comfortable or reformatory where such is the case? where the "chaplain does not talk to them privately," each upon his own peculiar sin and temptation; but where they are left, instead of meditating on their wickedness, and looking into their own hearts, to brood over hardship and the horsewhip?

The question is, what is the best mode of reforming our juvenile criminals,—by sending them to gaol, where they are contaminated by the older prisoners, or by sending them to these schools, where they learn their duty to God and man, and are taught to earn an honest and independent livelihood?

We must, sooner or later, arrest the progress of crime and lawlessness, which is weltering around the foundations of society. We have institutions, nicknamed charitable, for the relief of every kind of want, feigned or real, to which the working classes are liable, and which are far oftener the causes than the aids of necessity. We have a host of blind benevolences, and noxious charities,¹ for the cure of all evils except that which presses with tenfold more disastrous effect against the welfare of society, namely, the forlorn condition of the out-cast classes.

Nothing short of an organized system, specially designed for the purpose, will suffice. If young rogues in grain, born thieves, and confirmed vagabonds are to be converted into honest men and women, we must institute fitting means for that end. We must have moral manufactories as well as physical ones. We must look to the moral elements, even of physical progress; and he ill understands political economy, if he underrates this item in the wealth as well as the welfare of society.

The committee has been ably presided over by Mr. Baines, and we trust will continue its useful labours.

¹ An extremely able article on this subject, by an experienced observer, appears in the last number of the *Westminster Review*. He says, "The crimes of the virtuous, the blasphemies of the pious, and the follies of the wise, would scarcely fill a larger volume than the cruelties of the humane."

ART. VIII.—THE ECCLESIASTICAL COURTS AND THEIR JURISDICTION OVER PROBATE OF WILLS.

EVERY one agrees that the present system is bad. The only doubt is how to remedy it. It is usual under such circumstances to look to the Law Amendment Society for guidance. They who do so on this occasion will find, we fear, but little of it in the present indecision of that society on the subject in question. It has been vehemently discussed there for three successive nights¹ on the three following amendments, without arriving at any decision at all; for the only conclusion was to send them all, along with the original report, to the committee from which it emanated.

The following resolutions were submitted by the committee on Ecclesiastical Courts:—

I. "That the jurisdiction of the Ecclesiastical and Peculiar Courts in matters relating to the grant of probate and of letters of administration be transferred to the Court of Chancery."

II. "That in transferring this jurisdiction to the Court of Chancery, it is proposed to give that court the additional power necessary to enable it to adjudicate upon wills both of real and personal estate, with or without the aid of a jury as the case may require, such court to be clothed with all the power and jurisdiction which the Ecclesiastical and Peculiar Courts at present have."

III. "That in connection with the administration of the central court subsidiary jurisdiction should be given to the County Courts."

To which the following amendments were proposed:—

The following amendment was moved by Dr. Waddilove, LL.D., and seconded by Mr. W. D. Lewis:—

"That it is desirable that one testamentary jurisdiction should be formed in lieu of the various Ecclesiastical and Peculiar Courts at pre-

¹ It is really essential that some means be taken of docking long speeches in that, and in all societies where business is to be done. Each speaker, except the mover, should be rigidly confined to twenty minutes, as a maximum. A whole hour or more has been sometimes occupied by men who take no pains to condense their thoughts. It is not a debating club, and should not be allowed to degenerate into one. Lord Brougham kept the debaters in the Law Amendment Society in good order. His absence from it is a great detriment and loss to its efficiency.

sent exercising jurisdiction throughout England and Wales, and that for such purpose a tribunal be established, which shall have legal and equitable jurisdiction in all matters relating to wills and intestacies, whether of real or personal estate, which court shall be styled 'Her Majesty's Court of Probate and Succession for England and Wales.'"

A further amendment was then moved by Mr. Collier, M.P., and seconded by Mr. Massey, M.P. :—

"That the jurisdiction of the Ecclesiastical Courts to grant probate of wills and letters of administration should be transferred to the County Courts, provided that in all cases of disputed probate where the property exceeds a certain amount, either party shall be at liberty to remove the will into one of the superior courts of common law."

Mr. James Stewart gave notice of a further amendment, as follows :—

"That the present jurisdiction of the Ecclesiastical Courts, so far as testamentary matters are concerned, is universally admitted to be unsatisfactory, and requires extensive reform.

"That this reform should consist of a transfer of their present jurisdiction in testamentary matters to another court clothed with jurisdiction as well over wills of real as of personal estate.

"That to create a new court for the purpose would be inadvisable, if any existing court can be found to which such enlarged jurisdiction may be properly intrusted, and to which complete powers can be given.

"That the existing courts of common law and County Courts have no equitable jurisdiction or power of dealing with trustees, or with equitable matters arising on the construction of wills.

"That the existing courts of equity have no power of empanelling a jury or of conclusively deciding issues of fact.

"That in order to do complete justice in testamentary matters it is necessary that the court to which they are intrusted should possess the full and conjoined powers of a court of law and of a court of equity.

"That no thorough or satisfactory settlement of the questions pending with respect to the testamentary jurisdiction of the Ecclesiastical Courts can be come to except by the establishment of a court of conjoined law and equity, having jurisdiction over wills of real and personal estate.

"That it is the bounden duty of the government of this country to provide such a court for the proper adjudication of all testamentary matters, and of this Society to promote its establishment by every means in its power.

"That the most desirable means of effecting this appears to be the union of the present law and equity commissions, and inviting their immediate attention to this important subject."

We do not pledge ourselves to any one of these various

amendments, but judging of them comparatively, we incline to think the original report highly preferable to any of them. In fact, it embodies or implies nearly everything that is desirable in the amendments.

First, local jurisdiction. This is essential if there is to be any improvement at all. Everybody agrees, that the means of proving wills and administering estates should, at least up to a certain amount, be brought to every one's door, and the abomination done away with of forcing people to go to a great distance to arrange so simple a matter. Except in very intricate cases of contested probates, arising on questioned sanity of testator, &c., it is obviously within the competency of the County Courts to do all that is required, subject to the revision of a superior court. What is this superior court to be? The report says the Court of Chancery.

Well, that court has already a good deal to do with wills and the administration of estates; and it may be said, and is said, that if we abstract this business from it, it will have but little, comparatively, left to do. It might well have been replied in Lord Eldon's time, so much the better. Not so under Lord Cranworth, and the Lords Justices, and the Vice-Chancellors,¹ and the two new Examiners, and the new arrangements and rules, and the reforms still in project. It is now quite open to question, that there may be some good in letting the Court of Chancery exercise a jurisdiction, especially as a court of appeal. The days of *Jarndyce v. Jarndyce* are happily past; and such pictures are useless exaggerations of obsolete abuses.

The report provides for County Court jurisdiction. We again repeat our belief, that it will be advisable to have some such provision, and so thought the sub-committee of the Law Amendment Society. Mr. Collier's amendment does less. It does not provide for a central registration of wills, which is essential.

The report provides for the aid of a jury to ascertain facts as an appendage to the powers of the Court of Chancery. This may be made as useful as Mr. Collier's proposal to refer such

¹ We are bound to say (most painfully to ourselves), that there is an exception to the praise here implied. The profession will understand us, and do no injustice in the application.

cases to County Courts, where juries can be had, and to the superior courts of common law, which are sufficiently employed already, or soon will be.

Dr. Waddilove's amendment proposes an entirely new court. This is an evil of itself, and will be opposed vehemently in parliament, as we happen to *know*, and *think* with a good probability of success. His amendment, moreover, is obviously meagre and insufficient. It contains no proposal for local testamentary administration or for the better trial of issues of fact.

We should be disposed to agree with Mr. Stewart—that the County Courts suggestion is insufficient, as they have not the equitable jurisdiction required, but that it is obviously easy to bestow it. We think that the modification, or rather extended powers, proposed by the sub-committee's report, would meet Mr. Stewart's views as to the joint powers of a court of law and equity. His proposal for uniting the present Law and Equity Commissions is one deserving of mature consideration, as indeed all Mr. Stewart's suggestions are. We could have wished that he had condensed his amendments, if he thought it necessary, in fact, to move any; but on careful consideration of his proposals, we think them substantially the same as the report, unless by *a* court he intends to exclude local ones. If so, we respectfully dissent from his views, though we do not think he means to hold this.

A word as to the present courts and their functionaries. Dr. Bayford spoke up for them, and so did Mr. Pritchard. We quite agree that the practitioners in them ought not to be maligned. We are against all personalities of all kinds. But Dr. Bayford effectually answered himself. He spoke with great truth of the many important functions of his own courts. This is the best possible reason for relieving them of another, quite irrelevant to the rest, and nowise instrumental to the discharge of the duties and studies they impose. Pure ecclesiastical jurisdiction and the Admiralty suits will shortly give them quite enough to do. At present the public is quite unable to see why the same court, counsel, and proctors should undertake every kind of question arising about the frailties of wives, the navigation of ships, the morals of parsons, the administration of

wills, the correction of heresies, and the repair of churches! Courts of justice should not be Jacks of all trades, or the "*ignobile vulgus*" may rudely say they are likely to be masters of none, and peradventure make no great mistake.

We are, on the whole, of the opinion expressed in a contemporary, much as we respect the professional gentlemen concerned in the proposed measures, that as regards the present testamentary jurisdiction of all the Ecclesiastical Courts, "it is not a case for reform; the objection to them is not merely that they abound in monopolies and abuses, but that their foundation and structure are unsound, unfitted for the time, an insult to one half of the community, and an injustice to the other. It is as *Ecclesiastical* Courts that they are condemned. It is as such that they have usurped a jurisdiction over wills and marriages, which they cannot be permitted to retain under any pretence, or with any promises of reform. Let the Ecclesiastical Courts continue, if they please, their purely ecclesiastical jurisdiction; let them try church questions arising *within* the church; but take away from them everything that savours of a civil jurisdiction, and transfer it to the tribunals which are constituted for the protection of civil rights and the punishment of civil wrongs, to which all the people have access, in whose wisdom they have confidence, and where they may have the widest choice of lawyers to conduct their suits and plead their causes."

J. C. S.

ART. IX.—COMMON LAW PROCEDURE ACT.

IN accordance with an intimation which appeared in our last number, it is our intention to lay before our readers the decisions which have been given upon the provisions of the Common Law Procedure Act. We purpose, in a series of papers, to make the attempt of affording to the profession an accurate,

but condensed report of the judgments given upon cases arising under the Act; so that the practitioner may be enabled to learn with facility the nature of the points decided during each succeeding three months, and thus be saved much trouble that would arise from searching through each number of the *Jurist* or *Law Times*.

It has occurred to us, that such a means of information will be eminently useful to the attorney; that he will thereby be saved many unprofitable pilgrimages to his pleader, with which, we fear, those oracles of the law have been often troubled since the 24th of October, 1852.

We shall strive, on the one hand, to avoid the sterile brevity of the Digests, and on the other, not to imitate the too often needless length of the Reports. But we are anxious to do more; it is our wish to combine the reviewer with the reporter; not merely to chronicle, but also to comment; to reconcile apparently hostile decisions if possible, and when it is impossible, to ascertain with certainty what the law is, to offer advice, to the best of our ability, upon the course to be pursued.

But even here we shall not allow our task to conclude. We shall have the great object of law reform at heart, and, anxious to bear our part in the good work, we shall endeavour, whenever cause arises, in friendly spirit to suggest improvements in an Act, which we regard but as the first of a series of efforts to regenerate the operation and simplify the practice of our common law.

Amendment—Adding plea at trial.—At the sittings in London after Michaelmas Term last an action was brought for injury sustained from being run over by defendants' cart. It was proved that the person who was driving the cart was in the employ of the defendants, and that the cart belonged to them; but that at the time of the accident the servant was using the cart for purposes other than the 'defendants' service, and without their order and consent. The defendants had pleaded "not guilty," and "not possessed." Jervis, C. J., held, that the fact that the cart was being used by the servant for his own purposes as above could not be given in evidence under either of these pleas.

The counsel for the plaintiff then asked leave to place a plea

raising the above defence upon the record, claiming to do so under the 222nd section of the Common Law Procedure Act, which enacts as follows:—

“It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at *nisi prius*, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of a party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the Court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the two parties shall be so made.”

His lordship granted the application, on the ground that notice had been given to the plaintiff that such defence would be relied upon. A rule *nisi* was afterwards obtained for a new trial, on the ground of misdirection. Cause was shown in the Court of Common Pleas on the 27th of January (we are not aware that this case is yet reported). The Court held, that the defence raised by the added plea could have been given under the plea of “not guilty;” and, therefore, the question as to the correctness of allowing such plea to be placed upon the record at the trial was only incidentally referred to. Cresswell, J., however, intimated that, although he was not prepared to say that the Chief Justice was wrong in receiving the plea, yet he thought that the question was one deserving of great consideration, and he was unwilling to express an opinion upon it until fully argued before the Court. *Mitchell v. Crasswaller and another.*

COMMENCEMENT OF THE ACT—EFFECT UPON ACTIONS PENDING BEFORE THE 24th OCT. 1852.

1. *Alias Writ.*—A writ of summons had been issued on June 8th, 1852, it therefore expired on October 8th. By the Uniformity of Process Act, 2 Wm. 4, c. 39, s. 10, there is allowed one month, viz. until November 8th, to issue an *alias* writ. By the 10th section of the Common Law Procedure Act, it is enacted that—

“From the time when this Act shall commence and take effect, so much of a certain Act of Parliament, passed in the second year of the reign of his late Majesty King William IV. intituled ‘An Act for

Uniformity of Process in Personal Actions in his Majesty's Courts of Law at Westminster,' as relates to the duration of writs, and to *alias* and *pluries* writs, and to the proceedings necessary for making the first writ in any action available to prevent the operation of any statute whereby the time for the commencement of any action may be limited, shall be repealed, except so far as may be necessary for supporting any writs that have been issued before the commencement of this Act, and any proceedings taken, or to be taken thereon."

And by the 12th section it is enacted that—

"Where any writ of summons in any such action shall have been issued before, and shall be in force at the commencement of this Act, such writ may, at any time before the expiration thereof, be renewed under the provisions of and in the manner directed by this Act, and when any writ issued in continuation of a preceding writ, according to the provisions of the said Act of his late Majesty King William IV. shall be in force and unexpired; or where one month next after the expiration thereof shall not have elapsed at the commencement of this Act, such continuing writ may, without being returned *non est inventus*, or entered of record according to the provisions of the said Act of his late Majesty King William IV. be filed in the office of the Court within one month next after the expiration of such writ, or within twenty days after the commencement of this Act."

Now, in this case, the writ was neither a writ in force at the commencement of the Act, nor a writ issued in continuation of a preceding writ. The question, therefore, arose, whether the old form of *alias* writ should be issued, or whether the proceedings should be in accordance with the enactments contained in the recent statute. The Court of Common Pleas, agreeing with the Masters of that court and of the Exchequer, held that the provisions of the Uniformity of Process Act applied, and that an *alias* writ should issue. *Gapp v. Robinson*, 16 Jur. 977; S. C. 22 L. J. (N. S.) C. P. 5.

2. *Ejectment—Judgment against casual ejector.*—In an action of ejectment, the declaration had been served on the 6th of June, 1852. The Common Law Procedure Act came into operation on the 24th of October. By the 168th and following sections of that Act, the proceedings in actions of ejectment are altered, and the form of procedure is made to resemble that of a personal action. On motion made on the 2nd of November, 1852, for judgment against the casual ejector, the Court of Exchequer held that the action must be continued according to

the old practice ; for if otherwise, the previous proceedings would be of no avail, which would be manifestly unjust, inasmuch as their proceedings might have been necessary to save the Statute of Limitations. Rule granted. *Doe d. Smith v. Roe*, 16 Jur. 953 ; S. C. 22 L. J. (N. S.) Exch. 17.

3. *Judgment as in case of a nonsuit*.—Issue had been joined in July, 1852, and notice of trial given for the following summer assizes ; but the plaintiff had not proceeded to trial according to his notice. A motion was now made for judgment as in case of a nonsuit. The 100th section of the Common Law Procedure Act enacts, that—

“ The Act passed in the fourteenth year of the reign of his Majesty King George the Second, intituled, ‘ An Act to prevent Inconveniences arising from Delays of Causes after Issue joined,’ so far as the same relates to judgment as in the case of a nonsuit, shall be and the same is hereby repealed, except as to proceedings taken or commenced thereupon before the commencement of this Act.”

And the 101st section, that—

“ Where any issue is or shall be joined in any cause, and the plaintiff has neglected or shall neglect to bring such issue on to be tried, that is to say, in town causes where issue has been or shall be joined in, or in the vacation before any term, for instance, Hilary Term, and the plaintiff has neglected or shall neglect to bring the issue on to be tried during or before the following term and vacation, for instance, Easter Term and vacation ; and in country causes where issue has been or shall be joined in, or in the vacation before Hilary or Trinity Term, and the plaintiff has neglected or shall neglect to bring the issue on to be tried at or before the second assizes following such term, or if issue has been or shall be joined in, or in the vacation before Easter or Michaelmas Term ; then, if the plaintiff has neglected or shall neglect to bring the issue on to be tried at or before the first assizes after such a term, whether the plaintiff shall in the mean time have given notice of trial or not, the defendant may give twenty days’ notice to the plaintiff to bring the issue on to be tried at the sittings or assizes, as the case may be, next after the expiration of the notice ; and if the plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, the defendant may suggest on the record that the plaintiff has failed to proceed to trial, although duly required so to do (which suggestion shall not be traversable, but only be subject to be set aside if untrue), and may sign judgment for his costs ; provided that the Court or a judge shall have power to extend the time for proceeding to trial, with or without terms.”

The Court held that the word *thereupon* in the 100th section

must be construed as referring to the statute of George II., and not to the case; and that although it was not intended that the statute should have the effect of annulling proceedings already taken, the defendant must proceed under the 101st section, and refused the rule. It was, however, intimated that if the rule had been obtained before the Act came into operation, it might have been proceeded with, on the ground, we presume, that then proceedings would have been taken upon the statute of George II., which would have brought the case within the exception in the 100th section. *Morgan v. Jones*, 16 Jur. 978.

4. *Judgment as in case of a nonsuit in ejectment.*—A motion was made for judgment as in case of a nonsuit in an action of ejectment; the dates of the proceedings were similar to those in the above case of *Morgan v. Jones*. It was contended, in support of the motion, that the 100th section of the Act did not apply to actions of ejectment, the enactments as to that form of action being confined to the 168th and following sections, which have the following heading:—"And with respect to the action of ejectment be it enacted as follows." That if so, the 202nd section, which contains provisions similar to the 101st section, could not apply to actions already commenced; for by that section it is enacted that judgment shall be signed according to a form commencing—"On the day and year above written, a writ of our Lady the Queen issued forth of this court in these words,"¹ &c. And that as no writ had been issued in this action, by reason of it having been commenced previous to the 24th of October, the section must be taken to have reference only to actions of ejectment in which a writ had been issued. But the Court (although it offered a rule *nisi* upon risk of payment of costs) intimated a strong opinion that the defendant having neglected to take the cause down for trial by proviso, the provisions of the 101st and 202nd sections must now be applied, and refused the rule. *Doe d. Leigh v. Hunt*, 16 Jur. 978; S. C. 21 Law J. (N. S.) Exch. 335.

5. *Notice of declaration—Appearance sec. stat.*—A writ in action of debt was issued on the 29th of September, and duly

¹ Schedule A, Form 19.

served, but no appearance having been entered by the defendant, the plaintiff, on the 8th of October, entered an appearance *sec. stat.* On the 27th of October, which was after the coming into operation of the Common Law Procedure Act, the plaintiff filed a declaration, with a notice to plead in eight days, but gave no notice to the defendant of the declaration being filed. No plea being pleaded, judgment was signed on the 5th of November, and execution thereon issued. On cause being shown against a rule *nisi* to set aside the judgment so obtained, it was contended that the proceedings so taken were supported by the 15 & 16 Vict. c. 76, s. 28, which enacts—

“That in case of such non-appearance, where the writ of summons is not indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge’s order for leave to proceed under the provisions of this Act, and a copy of the writ of summons, to file a declaration, indorsed with a notice to plead in eight days, and to sign judgment by default at the expiration of the time to plead so indorsed as aforesaid,” &c.

But it was decided by the Court that the plaintiff must proceed according to the old practice; for that by the 26th section the statute relating to appearance for a defendant is repealed, “except so far as may be necessary to support proceedings heretofore taken;” and that as this case came within the exception, notice of filing declaration ought to have been given as formerly, and as that had not been done, the judgment was wrongly signed, and the rule was made absolute. *Goodliffe v. Neaves*, 21 Law J. (N. S.) Exch. 338; S. C. 16 Jur. 1025, S. P.; *Pigot v. Jackson, in notd.*, 21 Law J. (N. S.) Exch. 340.

6. *Special demurrer*.—On the 15th of May, 1852, the plaintiff had specially demurred to the defendant’s plea. The case came on for argument on November 15th, and it was urged *in limine* that the objection to the plea being the ground of special demurrer only, would not be sufficient to invalidate it, it being enacted by the 51st section of the Common Law Procedure Act, that “no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer.” The Court, however, were unanimous in the opinion that the

51st section referred only to the future, and not to the past. We give the judgment of Baron Parke, as reported in the *Jurist*:—

“It is as plain to my mind as possible. The rule for construing Acts of Parliament is that which I have already stated,¹ and applying it to this case, we shall find that the enactments refer to the future, and not to the past. To apply them to the latter would be unjust; for the parties have demurred, on the faith that they were entitled to do so. Taking all these clauses together, it is clear that they contemplate future proceedings, and future proceedings only. The 50th section provides that, *for the future*, judgment on demurrer shall be given according to the very right of the cause; the 51st, that *for the future* no special demurrer shall be allowed; and section 52, that *for the future*, when pleadings are drawn in a way calculated to prejudice, embarrass, or delay the fair trial of the action, objection may be taken to them in the manner there pointed out; namely, by application to the Court or a judge to amend or strike them out. Reading these clauses thus, they all become consistent, and form one uniform system. *Pinhorn v. Sonster*, 21 Law J. (N. S.) Exch. 336; S. C. 16 Jur. 1091.”

The result of the above decisions seems to prove the non-existence of any general rule as to the operation of the statute upon actions commenced before the 24th of October. But the desire of the courts appears to have been to allow the Act to take effect whenever it could do so without causing the possibility of injustice to either party to the suit.² The practitioner must, therefore, look at the effect of each particular proceeding, in

¹ His Lordship had referred to the maxim, *Nova constitutio futuris formam imponere debet, non præteritis*. 2 Inst. 292.

² Although the words of many clauses of the statute seem clearly to enact, that from the time of its coming into operation the practice shall be as therein enacted, it is plain that the courts were bound to control those words by the maxim referred to by Mr. Baron Parke in *Pinhorn v. Sonster*. A similar point arose as to the effect of the 4th section of the Statute of Frauds upon an action brought after the Act came into operation, upon a verbal agreement in consideration of marriage made previously. The Court held, that an action would well lie upon such a promise: “*Car ne fuit l'intent del Parliament à defeater promises fait devant l'Act.*”—*Gilmore v. Shuter*, 2 Lev. 227. And this seems to agree with the writings of Lord Bacon: “*Leges quæ retrospectivæ rarè et magna cum cautione sunt adhibendæ; neque enim placet Janus in legibus. Cavendum tamen est ne convellantur res judicatæ. Leges declaratorias ne ordinato nisi in casibus ubi leges cum justitia retrospectivæ possint.*”—De Aug. Scient. lib. viii. c. 3, Aphor. 47—51. See also, as to the retrospective effect of Acts of Parliament, Puffendorf, Droit de la Nat. lib. i. c. 6, s. 6; *Dash v. Klech*, 7 Johnson (U. S. R.), 477 (where the old authorities on this subject are most fully reviewed by Kent, C. J.); *Chappell v. Purday*, 12 M. & W. 303—306; *Doe d. Evans v. Page*, 5 Q. B. 767—772.

order to discover whether he should follow the old or new practice. For instance, where a writ is issued before October 24th, 1852, but the time allowed for appearance expires afterwards, and the defendant does not appear, the plaintiff, we conceive, should enter an appearance *sec. stat.*; for the writ states to the defendant that that course will be pursued. On the other hand, although the writ had been issued before the coming into operation of the Act, we see no reason why the pleadings should not be in accordance with the new forms, for no injustice is effected thereby. It certainly is to be regretted that the statute did not enact that all proceedings already commenced should be brought to a termination according to the old practice, for no injustice could thereby be effected, and numerous applications to the Court would thus have been prevented. The evil, however, that is caused by this uncertainty as to the effect of the statute on pending proceedings, is one that can exist but for a short time, and will in no way affect the general efficiency of the Act.

DEMURRING AND PLEADING AT SAME TIME—AFFIDAVIT AS TO
TRUTH OF PLEAS.

An application was made under the 80th section of the Act for leave to plead and demur at the same time to a declaration; that section enacts:—

“Either party may, by leave of the Court or a judge, plead and demur to the same proceedings at the same time, upon an affidavit by such party, or his attorney, if required by the Court or judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance, are respectively true in substance and in fact, and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law, and it shall be in the discretion of the Court or a judge to direct which issue shall be first disposed of.”

The defendant sought to demur to the declaration, and also to plead four pleas, all of which were traverses: of these pleas one traversed a fact the truth of which must have lain within the personal knowledge of the defendant; the other facts sought to be traversed were matters of which he had no such know-

ledge. In support of the application, a joint affidavit of the defendant and his attorney was used, which stated that—

“*They were advised and believed that the defendant had just ground to traverse the several matters proposed to be traversed.*”

And also—

“That the objection proposed to be raised by demurrer, was a good and valid objection.”

It was held by the Court, that notwithstanding the words of the statute, if a defendant sought to demur, and to traverse facts, the truth or falsehood of which must be within his own knowledge, he must in his affidavit swear that such facts were absolutely untrue, and that an affidavit, stating that the defendant is informed and believes them to be untrue, was insufficient.

The application was afterwards renewed as an amended affidavit, in which the defendant swore that the fact sought to be traversed by him, and the truth of which came within his knowledge, was absolutely untrue. The Court was satisfied with this affidavit, and granted a rule *nisi*, which, after argument, was made absolute. *Lumley v. Gye*, 16 Jur. 1048.

In an action on the case the defendant had obtained a rule to show cause why he should not be allowed to plead and demur at the same time to the declaration. The affidavit of the defendant's attorney used in support of the rule stated, amongst other things, “that deponent is advised and believes that the defendant has, under the circumstances aforesaid, just ground to plead not guilty to the declaration in this action, and also a traverse that the plaintiff confided in the said alleged fraudulent misrepresentation; and that he is also advised and believes that the declaration will be held bad in substance on demurrer, and that the objections to the same raised by such demurrer are good and valid objections in law.” It was objected on showing cause, that this affidavit did not comply with the requirements of the 80th section of the Common Law Procedure Act, inasmuch that it only stated that the deponent “is advised and believes,” and did not aver that the circumstances stated were true in substance and in fact. The Court, however, held that the affidavit was sufficient, and that the necessity of swearing to the absolute

truth only existed in relation to pleas in confession and avoidance, and not as to simple traverses. The rule was therefore made absolute, the demurrer to be argued first. *Price v. Hewett*, 17 Jur. 4.

The practice, therefore, as to the pleading and demurring at the same time, seems to be this:—That where a party seeks to demur and traverse, the Court will allow him to do so on his showing by affidavits, that he is informed and believes that he has a good cause of demurrer; that those facts sought to be traversed, the truth or falsehood of which must lie within his own knowledge, are untrue: and if he has no such knowledge, then that he is informed and believes them to be untrue. In all cases where it is sought to plead by way of confession and avoidance, together with a demurrer, the truth of such pleadings must be sworn to absolutely.

It will be observed that the decision in *Lumley v. Gye* appears to deviate from the words of the 80th section, for by that section it would appear to be sufficient for the party to show that “he is advised and believes that he has just ground to traverse the several matters sought to be traversed by him;” and this seems to have been the view taken the Court in *Price v. Hewett*: but the Court in the above case of *Lumley v. Gye* distinguished between traverses of facts where the party of his own knowledge must have known whether they be true or false, and of cases where he had no such knowledge, and held that in the former case the absolute untruth of the facts traversed must be deposed to.

SETTLEMENT OF ACTION.

A motion was made before Erle, J., in the Bail Court, calling upon the defendant to show cause why he should not be restrained from taking further proceedings to compel the plaintiffs to proceed to the trial of this cause, or to show cause why the time for proceeding to trial should not be extended with a stay of proceedings. It was stated that the action had been brought to recover a debt; that since the commencement of the action the defendant called upon the plaintiffs, admitted the debt, and

offered terms of settlement, which were not accepted. The action therefore proceeded, and the defendant pleaded, except as to 1*l.* 4*s.*, "never indebted." The defendant afterwards left the country, and an arrangement was then made by a relative to pay the debt by instalments, which were still in course of payment. Under these circumstances the plaintiffs refrained from going to trial, and thereupon the defendant's attorney served them with a notice under the 101st section of the Common Law Procedure Act, to bring the issue on to be tried. It was now argued that the power under this section was given as a substitute for the formerly existing motion of judgment as in case of a nonsuit, which is abolished by the 100th section; and that as these facts would have been deemed by the Court sufficient ground for refusing that motion,¹ so they ought to be sufficient to induce the Court to grant the rule prayed. With this view the Court concurred and granted a rule nisi. *Farthing and another v. Reed*, 20 L. T. Rep. 192.

WRIT OF SUMMONS—ORDER TO PROCEED WITHOUT PERSONAL SERVICE.

On motion for an order under the 17th section of the Common Law Procedure Act,² that the plaintiff should be at liberty to proceed as if personal service of the writ of summons had been effected on the defendant, the facts were stated as follows:—The defendant had given his address to the plaintiff's attorney

¹ As to the old practice see *Payne v. Haredale*, 1 Dowl. (N. S.) 525; *Elias v. Elias*, 9 Dowl. 104; *Smith v. Jay*, 2 Dowl. 410; and *Page v. Doughty*, 4 Scott, N. R. 523, where Erskine, J., says, "Is not the result of the cases this—that parties may compromise without the aid of their attorneys, provided such compromise is not effected with a view to cheat the attorney of his remedy against the opposite party for his costs?"

² Which enacts, that "The service of the writ of summons, wherever it may be practicable, shall as heretofore be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the Court out of which the writ of summons issued, or to a judge; and in case it shall appear to such Court or judge, that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such Court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the Court or judge may seem fit."

as of 97, High-street, Whitechapel; on application being made there, the applicant was informed that the defendant had merely an address there for the purpose of receiving letters, and that he had a place of business elsewhere. Several unsuccessful attempts were made to serve the defendant at the latter place, and ultimately a copy of the writ was inclosed in a letter, and left for the defendant, on the 4th of November, at the address in Whitechapel. It was ascertained that this letter had reached the defendant, and that his attorney had subsequently written to the plaintiff's attorney offering terms of settlement. No appearance had been entered by the defendant. After considerable discussion, it was held by the Court that, it being clearly shown that the writ had come to the defendant's knowledge, the order to proceed under the 17th section should be made absolute in the first instance, and also that it was unnecessary that the order should be served upon the defendant. *Barringer v. Handley*, 16 Jur. 1023; S. C. 22 L. J. (N. S.) C. P. 6.

LIST OF CASES.

- Barringer v. Handley*—Writ of Summons—Order to proceed without personal service, 16 Jur. 1023.
- Farthing and another v. Reed*—Notice to proceed to trial by defendant—Excuse by plaintiff, 16 Jur. 1023; 22 L. J. (N. S.) C. P. 6.
- Gapp v. Robinson*—Commencement of operation of Act—Alias writ, 16 Jur. 977; 22 L. J. (N. S.) C. P. 5.
- Goodliffe v. Neaves*—Commencement of operation of Act—Notice of declaration—Appearance *sec. stat.*, 16 Jur. 1025; 21 L. J. (N. S.) Exch. 338.
- Doe d. Leigh v. Hunt*—Commencement of operation of Act—Ejectment—Judgment as in the case of a nonsuit, 16 Jur. 978; 21 L. J. (N. S.) Exch. 335.
- Doe d. Smith v. Roe*—Commencement of operation of Act—Ejectment—Judgment against casual ejector, 16 Jur. 953; 22 L. J. (N. S.) Exch. 17.
- Lumley v. Gye*—Demurring and pleading at the same time—Affidavit as to truth of pleas, 16 Jur. 1048.

Mitchell v. Crasswaller and another—Amendment adding plea at trial.

Morgan v. Jones—Commencement of operation of Act—Judgment as in case of a nonsuit, 16 Jur. 978.

Piggott v. Jackson—Notice of declaration—Appearance *sec. stat.*, 21 L. J. (N. S.) Exch. 340.

Pinhorn v. Sonster—Commencement of operation of Act—Special demurrer, 21 L. J. (N. S.) Exch. 336.

Price v. Hewett—Demurring and pleading at same time—Affidavit in support of truth of pleas.

Notes of Leading Cases.

COMMON LAW.

CARRIERS BY SEA—BILL OF LADING—DAMAGE BY RATS.

Laveroni v. Drury, 22 Law Jour. Exch. 2.

THE law which determines the liability of carriers for goods intrusted to them by sea, depends mainly on the bill of lading. This is a document which sets forth not only what they are to carry, but how they are to carry it as regards its safe delivery. It is usual to say that they are to carry the goods and deliver them safe and free from all damage, with certain exceptions for which the carrier is not to be liable. These exceptions are thus stated in *Abbott on Shipping*—a standard authority: the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever.

But these terms are somewhat latitudinarian, and have admitted of some interpretations not quite within the four corners of the literal terms. For example—and it is the example this case develops—where rats gnaw the goods. Now, it has been old law that there is a case within the exception where the captain has taken due care to guard against the damage thus caused; and it has been queerly held that keeping two cats on board is sufficient care to exempt him from liability. *Roccus, De Navibus*, 58, so holds; and *Emerigon* says, "That if merchandise on board a ship is gnawed by rats, and the precaution has *not* been taken to put cats on board, the master is liable for the damage; but he is not liable if the cats be dead, provided he does not omit any means to procure others at the first point he touches at." (1 *Emer.* 375, 376, cit. *Consolata del Mare*, cc. 65, 66.) This divergence from the strict terms of the contract in

the bill of lading received a blow from the judgment in *Dale v. Hull*, 1 Wils. 281, where it was held that an action for damage done was wholly *ex contractu*, and (per Lee, C. J.) that "Everything is a negligence in a carrier or hoyman, that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events except they happen to be damaged by the act of God or the king's enemies."

In the case of *Laveroni v. Drury*, rats had gnawed a cargo of Parmesan cheeses from Genoa, and the Court of Exchequer overruled the old authorities above cited, and held that the accident exempting a master from liability must be within the exception in the bill of lading, that it arose from a danger of the sea; and that this could not be, inasmuch as it means damage caused "only by the violence of the wind and waves, which may be acting on a seaworthy ship, and does not cover damage by rats, which is a kind of destruction not peculiar to navigation, but to which commodities are liable on land and in warehouses." Other reasons of far less force are given, such as the degree of vigilance required to banish rats, and that cats would not suffice. These reasons are beside the question. The decision is on the terms of the contract. It does not matter how difficult or how easy it is to banish rats; the master or owner agrees to hold the consignor or consignee harmless from all kinds of damage, except such as arises from certain specified causes, of which rats is not one. This, then, is henceforth the law. 'The strict terms of the bill of lading bind the parties to the contract, and as a contract it will be judged.

CAUSE OF ACTION; WHAT IS, IN THE COUNTY COURT.

ACT, s. 60. *Barnes v. Marshall*, 21 Law Jour. Q. B. 388.

CAUSE of action cannot be said to arise until it is complete. It is a contradiction in terms to call it a cause of action before it is one. The County Court Act, s. 60, gives the judge power to try suits in his district in certain specified cases, and "in which (district) the cause of action arose." It is sometimes not very easy to ascertain where it does arise, but the case at the head of

this note shows that it is essential to be very strict in construing it, and not to mistake an *inchoate* cause for a cause of action.

Mr. Barnes was a carrier, and he carried timber for Mr. Marshall, from Swindon to London by canal; and his agreement was to do so "from Swindon wharf to London," "at 16s. per ton, to include all charges except wharfage." There was hauling done at Swindon. It was concluded that by common law the plaintiff could sue as a common carrier directly he received the goods (*Pickford v. Grand Junction Company*, 8 M. & W. 372), and as the contract for carrying was complete, and also the cause of action, and likewise that the plaintiff might sue for the hauling separately: It was held (by Erle, J.), that the carrier had no right to the reward till the service was complete, and that the delivery in London was part of the consideration, and essential to give a cause of action; and the hauling was not a distinct cause of action. A carrier is not obliged to carry goods without the pay for it advanced; but that is another point. The result is, that a plaintiff must show a distinct cause of action, and the terms of the contract must be entirely fulfilled to give it; otherwise a prohibition will lie under the 60th section of the County Court Act.

CRIMINAL LAW.

CONFESSIONS.

Reg. v. Hannah Moore, 21 Law Jour. M. C. 199.

It has been always held that the confessions of prisoners are inadmissible as evidence against them if they were obtained by any kind of threat or inducement, and that they must, in order to be available evidence, have been voluntarily made. (2 Starkie on Evidence, 36.) Refinements were subsequently made, and inducements did not afterwards exclude, unless made by a person in authority, over the prisoners. And it was enough if the person were the prosecutor, a magistrate, the constable appre-

hending, a gaoler, a captain of a vessel over one of his crew, or a master or mistress. But if made by the latter, the law has varied much as to the qualifications under which this relation was held to embrace sufficient authority to exclude the confession, the principle of exclusion being, of course, the degree in which the mind of the prisoner was likely to be impressed with a belief that the holder out of the inducement or threat had power to realize it. The earliest case on this point is that of *Rex v. Upchurch, R. & Moody*, 465. The mistress obtained this confession (of arson) *in the absence of the master, who was the prosecutor*. She said to the prisoner, her servant, "Mary, my girl, if you are guilty, do confess; it will perhaps save your neck." She confessed. It was contended that the wife had no authority, real or apparent, over the prisoner so as to hold out any hope which could influence her. The case being reserved, this confession was nevertheless held *inadmissible*.

In *Rex v. Taylor*, 8 Car. & P. 733, a step further was taken. There the confession was extracted from the prisoner by a mere bystander, nowise in authority, but the inducement was uttered in the presence of the wife of the prosecutor. Mr. Justice Patteson held the confession to be inadmissible, because there was an implied assent by the mistress. In *Rex v. Simpson, R. & Moody*, 410, this doctrine was again confirmed in the strongest manner, for it was not clear that the prosecutor's wife heard the inducement given by the persons not having authority who made it. See also *R. v. Laughner*, 2 Car. & Kir. 225.

The law remained so up to, and was again confirmed in 1848, by the case of *Reg. v. Garners*, 18 Law Jour. M. C. 1, where a medical man obtained a confession in the presence of the mistress, whom she had attempted to poison, and her husband, and the confession was held to have been wrongly admitted. All the judges concurring, Erle, J. throwing out that a mere exhortation to tell the truth would not exclude a confession.

In the case of *Reg. v. Moore* these decisions are overruled, for it is useless to attempt to reconcile them. The prisoner was a maid-servant charged with the murder of her child. Her *mistress* told her she had better speak the truth, and she says she will make a confession to the surgeon, which she accordingly

does. The evidence is received at the trial, and the point being reserved after *cur. adv. vult*, the Court holds that "the cases on this subject have gone quite far enough," by which the Court always means "a good deal too far." Accordingly, it held that the confession was admissible. *Rex v. Upchurch and Reg. v. Taylor*, and another unreported case, are sought to be distinguished on these new grounds. First, that in each of them the offence was committed against the master or mistress, and one of them was prosecutor; so that it is only where the offence concerns the master or mistress that an inducement or threat will exclude the confession, which was not the case here, where the offence was the murder of the prisoner's own child. Now, let us test this by the principle on which such confessions are ever excluded. Is it not on the sole ground that the prisoner may naturally suppose that the person offering the inducement or threat has power to fulfil it? Is it at all necessary to this impression on the mind of a servant girl, that her crime should directly "concern" her master or mistress? Is it not quite sufficient that the person making the inducement stands in the relation to the girl of all others the most likely to be associated with power in her mind. The mistress to a servant girl is the very personification of authority. In Mr. Taylor's book it is well laid down that those whose inducements exclude a confession, are they who have authority either "over the prisoner or the prosecution;" either will do. Dr. Greenleaf says, broadly, "In regard to persons in authority, there is not much room to doubt." Not a word has been hitherto said about the concern the inducer had in the offence. Everything has gone as the authority the inducer had over the person induced thereby to confess. Still less has anything been said about the inducer being prosecutor. Nor is it in the least likely that a servant girl in the horrible excitement attending her position, would critically weigh these conditions of authority. The inducer and promiser is her mistress,—*nomen potentissime!* to the servant maid. Let the learned judges reconsider this decision; it may, if persevered in, hang some innocent person. Until this be done, the law as now revised is that—

To exclude a confession induced by a master or mistress, they

must be directly injured by the crime; otherwise they are not "persons in authority" according to the established rule.

EQUITY.

INJUNCTION TO RESTRAIN THE BREACH OF A NEGATIVE STIPULATION IN A CONTRACT, BUT NOT NECESSARILY ENFORCING PERFORMANCE OF THE REMAINDER OF THE CONTRACT.

Lumley v. Wagner, 1 D. G. McN. & G. 604.

WILL a court of equity interfere by injunction to restrain the breach of a negative stipulation in a contract, when the injunction may in effect fall short of compelling complete performance of the entire contract, and may leave a portion of the contract unexecuted?

This is a question which the authorities, previous to *Lumley v. Wagner*, had left in much confusion and perplexity, which, following the clue afforded by the judgment of Lord St. Leonards, we shall endeavour to clear up.

The first case usually cited on this question is that of *Martin v. Nutkin*, 2 P. Wms. 266, which came before the Lords Commissioners Gilbert and Raymond, in 1724. The facts were these:—The plaintiff's house being so near the church, that the five o'clock bell, rung in the morning, disturbed her, the plaintiff came to an agreement in writing with the churchwardens and inhabitants at a vestry, that the plaintiff would erect a cupola and clock at the church, and in consideration thereof, the five o'clock bell should not be rung in the morning. The plaintiff erected a cupola, clock, and bell, but the defendant Nutkin, being since chosen churchwarden, obtained an order of vestry for ringing again the five o'clock bell; whereupon, upon a bill filed by the plaintiffs, Lord Macclesfield granted an injunction, which the Lords Commissioners, at the hearing of the case, continued for the lives of the plaintiffs. That case, therefore, as was observed by Lord St. Leonards in the case before us, however it may be explained as one of the exceptional cases, is

nevertheless a clear authority, showing that the Court of Chancery has granted an injunction prohibiting the commission of an act in respect of which the court could never have interfered by way of specific performance.

The next case resembles more closely a case of specific performance. It is that of *Barret v. Blagrove*, 5 Ves. 555. There a lease had originally been granted by the plaintiffs, who were the proprietors of Vauxhall Gardens, of an adjoining house, under an express covenant that the lessee would not carry on the trade of a victualler, or retailer of wines, or generally any employment that would be to the damage of the proprietors of Vauxhall Gardens. An under-lease having been made to the defendants, who were violating the covenant by the sale of liquors, the proprietors of Vauxhall Gardens filed a bill for an injunction, which was granted by Lord Loughborough.

It may be said that neither of these cases goes far towards the solution of the question before us, for in both, the contracts had been already performed by one of the parties, and the interference of the court, however powerless it might have been under different circumstances, to execute the entire contracts, yet, under existing circumstances, left nothing further to be performed.

The same remark may seem in some measure applicable to the well-known rule of the court in the case of attorneys' clerks, and surgeons' and apothecaries' apprentices, and the like, in which equity has constantly interfered, simply to prevent the violation of negative covenants, *e. g.* not to practise within certain limits, although no question of specific performance is involved. In such cases, it may be said, the court only acts on the principle, that the clerk or apprentice has received all the benefit already, and the prohibition operates upon a concluded contract.

The familiar case of a tenant's covenanting not to do a particular act, is clearly to the purpose. It has been said, indeed, that in such a case, the jurisdiction springs out of the relation of landlord and tenant, and that the tenant having received the benefit of an executed lease, the injunction operates only so as to give effect to the whole contract.

"That, however," as was observed by the Lord Chancellor, "cannot be the principle upon which the court interferes, for, beyond all doubt, where a lease is executed containing affirmative and negative covenants, equity will not attempt to enforce the execution of the affirmative covenants, either on the part of the landlord or the tenant, but will leave it entirely to a court of law to measure the damages; and yet, with respect to the negative covenants, if the tenant, for example, has stipulated not to cut or lop timber, or any other given act of forbearance, the court does not ask how many of the affirmative covenants on either side remain to be performed under the lease, but acts at once by giving effect to the negative covenant, specifically executing it by prohibiting the commission of acts which have been stipulated not to be done."

The earliest case most directly bearing on the question at the head of this paper, is that of *Morris v. Colman*, 18 Ves. 437. Colman was a part-proprietor with Morris, of the Haymarket theatre, and they were partners in that concern, and by the deed of partnership Colman agreed that he would not write for any other theatre than the Haymarket. He did not covenant that he would write for the Haymarket, but it was merely a negative covenant that he would *not* write for any other theatre than the Haymarket. Lord Eldon granted an injunction against Colman writing for any other theatre than the Haymarket.

The same judge who granted an injunction in *Morris v. Colman* refused an injunction in the case of *Clarke v. Price*, 2 Wils. 157, where the agreement was, that Price was to take notes of cases in the Court of Exchequer, and compile reports for the plaintiff, who filed a bill for an injunction to restrain the defendant from writing for other parties. But in that case it should be observed that there was no negative stipulation expressed or implied: none such was expressed, and Lord Eldon was clearly of opinion, upon the construction of the agreement, that it would be against its meaning to affix to it a negative quality, and impart a covenant into it by implication; and he therefore refused the injunction.

Thus far the authorities were strongly in favour of granting an injunction to complete the performance of a negative stipulation where a negative stipulation existed, even although the injunction might in effect fall short of compelling the complete performance of the entire contract. Two decisions, however, of

the late Vice-Chancellor of England, one in the case of *Kemble v. Kean*, 6 Sim. 333, the other in that of *Kimberley v. Jennings*, 6 Sim. 340, introduced into this part of the law an amount of confusion which, although those decisions were subsequently overruled by the same judge in the case of *Rolfe v. Rolfe*, 15 Sim. 88, have never ceased to embarrass the profession.

In the first of the anomalous cases to which we have referred, Mr. Kean had agreed that he would perform for Mr. Kemble at Drury Lane, and that he would not perform anywhere else during the time that he had stipulated to perform for Mr. Kemble. Mr. Kean broke his engagement, a bill was filed, and the Vice-Chancellor was of opinion that he could not grant an injunction to restrain Mr. Kean from performing elsewhere, which he was either about to do or actually doing, because the court could not enforce the performance of the affirmative covenant, that he would perform at Drury Lane for Mr. Kemble.

Kimberley v. Jennings was a case of hiring and service, and the Vice-Chancellor there virtually admitted that a negative covenant might be enforced in equity, and quoted an instance to that effect within his own knowledge. He said:—"I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district. The court would execute such a covenant, on the ground that a valuable consideration had been given for it." He admits, therefore the jurisdiction of the court, if nothing but that covenant remained to be executed. He adds, however, "But here the negative covenant does not stand by itself: it is coupled with the agreement for service for a certain number of years, and then for taking the defendant into partnership: * * * therefore this court cannot perform any part of it."

Notwithstanding these anomalous decisions of the late Vice-Chancellor, to which we might add another of the same judge, in *Baldwin v. The Society for the Diffusion of Useful Knowledge*, 9 Sim. 393, Lord Cottenham, in *Dietrichsen v. Cabburn*, 2 Phil. 52, followed the general course of the authorities as indicated above. There the defendant, in order to obtain a great circulation of his patent medicine, entered into a contract

with a vendor of such articles, giving him a general agency for the sale of the medicine, with 40 per cent. discount, and stipulating that he would not supply anybody else at a larger discount than 25 per cent. He violated his contract, and was proceeding to employ other agents with a larger discount than 25 per cent. An injunction was applied for, and was granted; the ground for the injunction being, not that it was a case of partnership, for it was strictly one of principal and agent, but that the agreement contained a negative stipulation, to the benefit of which the plaintiff was entitled.

In the same year in which Lord Cottenham overruled the decision of the Vice-Chancellor of England in *Dietrichsen v. Cabburn*, the latter judge overruled himself by his decision in *Rolfe v. Rolfe*, to which we have already adverted. In that case William, James, and Francis Rolfe were partners as tailors. William and James went out of the trade in consideration of receiving 1,000*l.* each, and Francis was to continue the business on his own account. William entered into a covenant that he would not carry on the trade which he had just sold within certain limits, and Francis entered into a covenant that he would employ William as cutter, at a certain allowance. The bill was filed simply for an injunction to restrain William from setting up as a tailor within the prescribed limits, and the Vice-Chancellor granted that injunction. It was objected that the court could not grant the injunction when there was something remaining to be performed, for that William had a right to be employed as a cutter, which right this court would not even attempt to deal with or enforce as against Francis—a grave objection, which we shall have occasion to notice in a subsequent paper. But the Vice-Chancellor held it to be no objection at all, observing, that the bill simply asked for an injunction, which he would grant, although he could not give effect to the affirmative covenant to do the act in respect of which no specific performance was asked. His own decisions in *Kemble v. Kean*, and *Kimberley v. Jennings*, were pressed upon him; but he replied that “the bills in those cases asked for specific performance of the agreements, and that the injunctions were sought as merely auxiliary to that relief, whereas in the case

before him the bill asked merely for an injunction."—A decision which clearly abandoned the ground taken in *Kemble v. Kean* and *Kimberley v. Jennings*, inasmuch as it rested the rule no longer on the inability of the court to enforce a negative covenant, but on the form of the pleadings.

In this unsatisfactory state were the authorities found when the question was again raised in the case of *Lumley v. Wagner*.

There Johanna Wagner agreed with the plaintiff, Lumley, that she would sing at her Majesty's Theatre during a certain period of time, and would not sing elsewhere without his written authority; and the plaintiff, who had fulfilled so much of his portion of the agreement as was then liable to be performed by him, filed his bill to restrain Johanna from singing for a third party.

The points taken by the defendant's counsel were based upon the rule formerly adopted, as we have seen, by the late Vice-Chancellor of England, and amounted to this,—that a court of equity ought not to grant an injunction except in cases connected with specific performance, or where, the injunction being to compel a party to abstain from committing an act, and not to perform an act, that injunction would complete the whole of the agreement remaining unexecuted. It was contended that *Morris v. Colman*, and *Dietrichsen v. Cabburn*, were cases of partnership, and the argument from the analogy of the familiar cases of injunctions against clerks and apprentices who had covenanted not to practise within certain limits, was met in the manner we have already indicated: those cases, it was said, were in the nature of concluded contracts, and where the jurisdiction of the court was only exercised with the view of effectuating the whole contracts, by preventing the party who had received a valuable consideration for his covenant from infringing that covenant.

Lord St. Leonards, in giving judgment, said:—

"The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendant, which state of facts may have, and in some cases has, introduced a very important difference,—but of an act to be done by Johanna Wagner alone, to which is superadded a negative stipulation on her part, to abstain from the commission of any act which will break in upon her affirmative covenant—the one being ancillary to, concurrent

and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract; it is in effect one contract; and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended, that Johanna Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion, that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract, as much as she would now do with reference to the contract into which she has actually entered.¹

"Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this discretion has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the injunction is not to be extended, yet a judge would desert his duty, who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity."

Adverting then to the authorities, his lordship admitted they had not been uniform; but the conclusion at which he had arrived was, he conceived, supported by the greatest weight of authority. It was true that *Morris v. Colman* was a case of partnership, and it was clear from the observations which fell

¹ In the "Notes on Leading Cases" it does not generally fall within our purpose to venture upon original remarks upon the decisions we are called upon to notice, but in a subsequent page of the report of *Lumley v. Wagner* we find the following words, attributed by the reporter to Lord St. Leonards:—"I may at once declare, that if I had only to deal with the affirmative covenant of the defendant Johanna Wagner, that she would perform at Her Majesty's Theatre, I should not have granted any injunction." And this while in the text his Lordship has admitted, as strongly as words can express the admission, "that he was of opinion, that if Johanna Wagner had attempted, *even in the absence of any negative stipulation*, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered." Either the very learned judge must have forgotten one of these *dicta* when he gave utterance to the other—a supposition which no one can entertain for an instant,—or else the arm of equity must be lamentably short to enforce performance of "the spirit and true meaning of contracts."

from Lord Eldon upon a subsequent occasion (see 2 Wils. 157), that he had mainly decided that case on the ground of partnership, but he had not decided it entirely on that ground. Adverting in his judgment to a case suggested by Sir Samuel Romilly which was almost identical with the present, Lord Eldon had said :—

“If Mr. Garrick was now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket theatre, and Mr. Colman with him to write for the theatre alone? Why should they not thus engage for the talents of each other?”

Thus giving the clearest enunciation of his opinion, that that would be an agreement which this court would enforce by way of injunction. Then in *Clarke v. Price*, there being no negative stipulation expressed, Lord Eldon, being of opinion, upon the construction of the agreement, that it would be against its meaning to affix to it a negative quality, very properly refused the injunction. That case, therefore, in no respect touches the question now before the court; “and I may at once declare,” continued Lord St. Leonards, “that if I had only to deal with the affirmative covenant of the defendant Johanna Wagner that she would perform at Her Majesty’s theatre, I should not have granted any injunction.” His lordship then proceeded to make a very careful examination of the case of *Kemble v. Kean*, “the first case,” as he observed, “which had, in fact, introduced all the difficulties into this part of the law;” and, after noticing subsequent decisions to which we have already referred, continued, “Up to the period when *Dietrichsen v. Cabburn* was decided, I apprehend that there could have been no doubt on the law as applicable to this case except from the authority of Vice-Chancellor Shadwell; but, with great submission, it appears to me that *the whole of that learned judge’s authority is removed by himself in the later case of Rolfe v. Rolfe*. * * * Whether the form of the pleadings” (meaning the form of the pleadings upon which, as already mentioned, the decision in *Rolfe v. Rolfe* was made to turn) “was sufficient to justify his opinion, is a question with which I need not deal, but I am very clearly of opinion that the case of *Rolfe v. Rolfe* does remove

the whole of the weight of that learned judge's authority on this subject." His lordship then concluded as follows :—

" From a careful examination of all these authorities, I am clearly of opinion that the principles and rules deducible from them are in direct contravention of those principles and rules which were so elaborately pressed upon me during the argument : and I wish it to be distinctly understood that I entertain no doubt whatever that the point of law has been properly decided in the court below."

Upon the whole, therefore, *Kemble v. Kean*, and that class of cases, may be considered as now overruled. And the principle of the court may be taken to be this, that where for considerations the performance of which is not in question, a person enters into a positive agreement to do an act, and there is super-added to such agreement an express stipulation to abstain from the commission of any act which will break in upon such affirmative agreement, the one being ancillary to, concurrent and operating together with the other, there, although the court may be powerless to enforce specific performance of the entire contract, it will nevertheless interfere by injunction to prevent the violation of the negative stipulation.

This case should be noted as well in connection with the cases cited, as with *Drewry's* remarks (*Injunctions*, p. 256, Supplement p. 61).

INJUNCTIONS IN THE CASE OF CORRELATIVE AGREEMENTS, ONE OF WHICH CANNOT BE SPECIFICALLY PERFORMED.

It will be seen,¹ that the question with which the preceding paper commenced is but partially answered by the decision in *Lumley v. Wagner*. That decision left untouched the subject of reciprocal, or, as Lord St. Leonards termed them, "correlative" agreements, and it still remains to be considered whether, where there are two correlative agreements mutually entered into by two parties, an injunction will be granted to restrain the breach of a negative agreement, when the court would be powerless to enforce performance of the entire contract.

This question, which was settled by Lord Lyndhurst in *Hills v. Croll*, had been partially raised, and the principle upon which it was eventually decided had been clearly pointed out at a

¹ *Hills v. Croll*, 2 Ph. 60 ; S. C. 1 De G. McN. & Gor. 627.

much earlier date. Not to go further back than 1818, Lord Eldon had sufficiently indicated the rule of equity applicable to such circumstances in the case of *Smith v. Fromont*, 2 Swanst. 330. There two persons had agreed to work a coach from Bristol to London, one providing horses as far as Hare Hatch, the other for the remainder of the road; and the profits being divisible in the ratio of the distance for which each party undertook to provide. The plaintiff fell into embarrassments, which produced the seizure of his horses, and an advertisement for the sale of them by the sheriff. While the plaintiff was in this situation, the defendant was bound by his agreement to undertake with persons at Bristol, to bring them to London; and when they arrived at Hare Hatch, he was stopped by the plaintiff's want of horses, and was liable to an action by every individual within and without the coach, if it were not forwarded. Accordingly he provided horses for that part of the road for which the plaintiff had undertaken to provide, and claimed the whole profits of the journey. Upon this the plaintiff applied for an injunction, which was refused. Lord Eldon, in refusing the injunction, said, "If I enjoin the defendant from bringing horses to convey the coaches between the limits in question, I must enjoin the plaintiff from *not* bringing horses there. I cannot restrain the defendant, unless I have the means of assuring him that he shall find the plaintiff's horses ready. I should otherwise enjoin him from doing that which, if he omits to do, he will be liable to actions by every person whom he has undertaken to convey from Bristol to London, and should issue the injunction on the supposition that the plaintiff would do that which he has not done, and which it seems he is not at present in a condition to do."

In the case of *Smith v. Fromont*, however, it may be said, as it was in fact said by the late Lord Chancellor (Lord St. Leonards), that "there was no negative stipulation;" by which we take his lordship to have meant, not only that there was no negative stipulation expressed, but that none such was implied. In *Hills v. Croll*, however, this pretext was removed, and yet Lord Lyndhurst refused an injunction to restrain the violation of such a negative stipulation, on the ground that the court was powerless to compel the performance of the reciprocal, or, as

Lord St. Leonards calls it, the "correlative," positive agreement. There Hills had given Crolls a sum of money, and Crolls had covenanted that he would buy all the acids he wanted from the manufactory of Hills, who covenanted that he would supply the acids, *and Crolls also covenanted that he would buy his acids from no other person.* Yet Lord Lyndhurst refused to prohibit Crolls from obtaining acids from any other quarter. And why? "Both," says Lord St. Leonards (1 D. G. McN. & G. 626), "because the covenants were correlative, and because he could not compel Hills to supply Crolls with acids; and if, therefore, he had restrained Crolls from taking acids from any other quarter, he must have ruined him in the event of Hills breaking his affirmative covenant to supply the acids."¹

This decision appears to be reasonable. An injunction in this case against Crolls would have amounted to a decree against him for specific performance of his part of the agreement, Hills being left uncontrolled to perform his part or not at his pleasure. It would, in fact (for everybody knows that there are circumstances under which specific performance may be as completely effected indirectly by injunction, as directly by a decree), have performed the agreement on one part, and left it on the other part unperformed; whereas the principle of the court is well known to be this—never to interfere to compel specific performance of an agreement, unless it can itself execute the whole contract in the terms agreed upon. (Lord St Leonards as Lord Chancellor of Ireland, in *Gervais v. Edwards*, 2 Dru. & War. 80.)

JURISDICTION—BILL TO SET ASIDE DEED EXECUTED TO DEFEAT SEQUESTRATION IN ECCLESIASTICAL SUIT.

Blenkinsopp v. Blenkinsopp, 1 D. G. McN. & Gor. 495.

AN appeal from the decree of the late Master of the Rolls in this cause, which has already been noticed in a paper on "Leading Cases in Equity" (47 L. M. 267), was dismissed with costs by the Lords Justices of the Court of Appeal in Chancery.

¹ It is scarcely necessary to point out to our readers the effect of this principle upon the judgment of the late Vice-Chancellor of England in *Rolfe v. Rolfe*, as given in the last preceding paper. See Lord St. Leonards' remarks, 1 D. G. McN. & Gor. 631.

Short Notes of New Books.

Reports of the Decisions of Committees of the House of Commons during the Fifteenth Parliament of the United Kingdom. By David Power, Esq., Recorder of Ipswich; Hunter Rodwell, Esq., Barrister-at-Law; and Edward L'Estrange Dew, Esq., M.A., Committee Clerk of the House of Commons. London: Stevens and Norton, 1853.

THESE gentlemen have rendered good service to those who are concerned in election laws. The selection of cases is judiciously made, beginning with Great Yarmouth, in February, 1848, and ending with Harwich, in May, 1851. Thirty-three cases are given, and they are all important; but we should have much preferred a treatise on the subject embodying them. The editors have, however, fully fulfilled their profession in the preface of "presenting these decisions to the public in a concise and available form. They have spared no pains to insure accuracy; and they beg to acknowledge the ready courtesy with which assistance has been afforded to them by the counsel and agents who were engaged in the various cases."

The New Practice of the Court of Chancery, with an Introduction, Notes, Acts, all the new General Orders, and a copious Index. By James O'Dowd, Esq., Barrister-at-Law. Second Edition. London: Butterworth, 1853.

A NICELY arranged little book, which will not fail to be of service to the practitioner in the Court of Chancery. It has been rendered very necessary by the many changes recently made in the procedure in Chancery. The new orders and rules and the statutes are given *in extenso*.

Epitome of the new Chancery Practice, combining the Acts 15 & 16 Vict. cc. 80, 86, 87; with an Appendix containing the Acts and Orders. By Thomas Braithwaite, of the Record and Writ Clerks' Office. London: Stevens and Norton, Bell-yard, Lincoln's-inn, 1853.

ANOTHER book on Chancery practice also very useful as well as Mr. O'Dowd's; he digests the rules carefully and well, and gives the statutes entire.

The Common Law Procedure Act. By Robert Malcolm Kerr, Barrister-at-Law. Second Edition. London: John Crockford, Essex-street, Strand, 1852.

WE have now carefully examined all the editions of this important statute, and we are bound to give the palm to Mr. Kerr. This

second edition is a proof of his success and of the truth of our judgment.

The new System of Common Law Procedure according to the Common Law Procedure Act, 1852. By J. R. Quain, Barrister-at-Law, and H. Holroyd, Special Pleader. London: Butterworths, Fleet-street, 1852.

A **SOMEWHAT** meagre work, containing but little more than the Act and some sensible notes interspersed. These, however, are written apparently under the assumption that the Act is permanently to remain as it is. This is not so. It will be speedily amended, we understand. Some of the recent decisions are not given.

The new Chancery Acts, 15 & 16 Vict. cc. 80, 86, 87, and the new General Orders. By Thomas Emerson Headlam, Esq., M.P., Q. C. London: Stevens and Norton, Bell-yard, Lincoln's-inn, 1853.

THE Acts and orders are correctly given in this edition, with scanty notes.

The Theory of the Common Law. By James M. Walker, Esq., Charleston, S. C. Boston: Little, Brown, and Co., 1852.

LEGAL aphorisms most tersely put and for the most part with extreme lucidity and accuracy. Its object is well attained, namely, to the leading thought of that noble system of jurisprudence the common law.

Reasons for Legalizing Marriage with a Deceased Wife's Sister. By Lord Denman. London: Hatchard and Son, Piccadilly, 1852.

THIS pamphlet is a very important one; it gives the sanction of the highest judicial authority, and of one of the most powerful and upright judgments in the country, in favour of marriage with a deceased wife's sister. Lord Denman sets forth the chief opposing opinions, and then argues against the existing law, which he contends cannot be defended by Scripture. On this point he says:—

"We know that marriage with a brother's widow continued after the promulgation of the Levitical law,¹ to be practised in Israel, as marriage with a wife's sister had been before, even by the patriarch who gave his own name to the chosen race.

"One argument, deserving notice for its originality, seeks to infer the prohibition from the condemnation which, on one occasion, is surmised to

¹ Ruth i. 11.

² Gen. xxix. 28. But an argument appears to have been lately insinuated out of the fact that polygamy was permitted to the Hebrews. I must see this argument developed and applied before I attempt to deal with it.

have followed its infraction. I speak of the rebuke administered to King Herod by John the Baptist, who thereby lost his liberty, and ultimately his life. The offence for which the king was rebuked, is described by three of the Evangelists. 'For Herod had laid hold on John, and bound him, and put him in prison, for Herodias' sake, his brother Philip's wife, for John said unto him, It is not lawful for thee to have her' (St. Matt. xiv. 3, 4). 'Herod, the tetrarch, being reprov'd by him for Herodias, his brother Philip's wife' (St. Luke iii. 19). 'Herod had laid hold upon John, and bound him in prison for Herodias' sake, his brother Philip's wife, for he had married her. For John had said unto Herod, 'It is not lawful for thee to have thy brother's wife' (St. Mark vi. 17, 18). The fact is not recorded by St. John.

"The Bishop of Exeter proceeded to argue from other sources of information that Philip was dead before his brother took Herodias. I cannot boast of any acquaintance with the state of that family, but really cannot persuade myself, even on such high authority, that John the Baptist and the Evangelists were not fully aware of the important difference between a wife and a widow. Nor can I believe that, if they had intended to brand as sin what would otherwise appear to be lawful, they would not have pointed this single anathema more distinctly against it. But after all, indeed the case is that of a brother's wife, not a wife's sister, and can furnish no argument but from that reasoning from analogy against the admissibility of which I contend. Moreover, if Herod had only succeeded to a deceased brother's widow, his doing so might, perhaps, *had there been no issue*, be justified as a compliance with the Divine command in Deuteronomy xxv. 5, recognised in St. Matt. xxii., St. Mark xii., St. Luke xx."

After combating Lord Campbell's opinion, who warned us against touching a law under which so happy a state of morals had flourished among us, and which Lord Denman does not think quite so pure, he thus dissents from the objections urged on social grounds against the proposed marriages:—

"The reason of the apprehensions felt is not easily ascertained. Two supposed evils have been brought to my knowledge. The cessation of that 'innocent familiarity' between the husband and the wife's sister in her lifetime, which the possibility of their marriage after her death might prevent, is one of these evils. But I venture to think that the danger is no greater in this case than in many others constantly recurring in domestic life; that innocent familiarity may exist without a thought of marriage, and that that familiarity cannot well be innocent, if practised towards a sister-in-law, which would not be permitted towards any other female friend of the wife.

"The other evil is one which cannot occur till after the wife's decease. Then, it is said, the desirable object of the children's education being attended by their aunt and most natural guardian, will be defeated by the impossibility of her living in the same house, if subsequently they may become man and wife. I respectfully ask why this should be? Any chance of the widower becoming the lady's husband, would obviously give him an additional motive for preserving her virtue and purity. But who could encounter the suspicion and the scandal? The answer is, that both have been braved, in our own time, by persons of eminent station and signal virtue, but neither has been found to have any real existence. The suspicion will hardly be felt, unless by those whose own very lax morality may make such conduct venial in their eyes; and when will legislation end, if it is to enter the lists with scandal?"

His lordship then puts the following forcible alternative :—

“When this question is brought judicially before the House of Lords, the result, either way, will be but little honourable to the wisdom of British legislation. If marriages solemnized in foreign countries are held good, every man who can afford to pay his passage to Hamburg or Copenhagen will be free to go there and marry his deceased wife's sister; and the law will exhibit another of those disparities in its dealing with rich and poor, which are its greatest scandal and justest reproach, and are ever engendering distrust and discontent in the governed. But if such foreign marriages, also, shall be held null and void, the present practice will continue notwithstanding. Widowers will still marry their sisters-in-law, when both parties are convinced that their union is not prohibited in Holy Writ. They will, as heretofore, brave ecclesiastical censure fulminated against themselves, and will protect the temporal interests of their children from the effect of an oppressive law, by settling their property.”

The Bishop of St. David's seems to have opposed the repeal of the law, though he admits it to be—

“Unsanctioned by God, because the sufferers by it, and their advocates, were too importunate, too vehement, too eager in their efforts to procure relief — an alarming argument ;” says Lord Denman ; “for it must always be strong in proportion as the grievance is intolerable ; an argument often employed against Wilberforce and his coadjutors in their endeavours to put down the execrable traffic in human beings, and in defence of those unchristian laws against all who in matters of religion differ from the majority of their fellow-subjects, which fanaticism has at all times most fondly cherished.”

The real objection to the repeal is that a very small section of the people care about it, and those reforms must at least have prior attention which affect large portions of the community.

Morse's Patent.—Full Exposure of Dr. Charles Jackson's Pretensions to the Invention of the American Electro-Magnetic Telegraph. By Hon. Amos Kendall, late Postmaster-General, U. S. Washington. Printed by John T. Towers, 1852.

WE cannot pretend to enter into the merits of this dispute. We can only say that this pamphlet is clever and telling.

Report and Suggestions addressed to the Mercantile Community of the United Kingdom by the London Committee of Merchants, 1852.
London : Longman, Brown, Green, and Longmans ; Edinburgh : Adam and Charles Black.

THIS is a very important society, whose views are entitled to the utmost consideration, which we have no doubt it will receive from the present law officers of the Crown.

Events of the Quarter.

MISCELLANEOUS.

THE MINISTRY having resigned, the following new law officers have been appointed :—

Lord Chancellor, Lord Cranworth.

The Prime Minister, Lord Aberdeen, requested Lord St. Leonards to retain the Great Seal, which his lordship declined doing.

Sir Alexander Cockburn has been again appointed Attorney-General, and Mr. Bethell, Q. C., Solicitor-General.

Vice-Chancellor Sir George Turner has been appointed one of the Lords Justices of Appeal, in the room of Lord Cranworth.

Sir W. Page Wood succeeds Sir George Turner as Vice-Chancellor.

IRELAND.—Lord-Chancellor, Right Hon. M. Brady; Attorney-General, Mr. A. Brewster; Solicitor-General, Mr. W. Keogh.

SCOTLAND.—Lord-Advocate, Right Hon. J. Moncreiff; Solicitor-General, Mr. W. Deas. Mr. J. C. Brodie has been re-appointed to the office of Crown Agent. The Deputy-Advocates the same as under Lord John Russell's late Ministry, viz.:—Messrs. George Young, Thomas Cleghorn, George Dingwell Fordice, and A. R. Clark. Mr. James Donaldson, Advocate-Depute for the Sheriff's Court and Exchequer.

Mr. Grenville Berkeley has been appointed Secretary to the Poor Law Board.

C. S. Whitmore, Esq., the Recorder of Lichfield, has relinquished that appointment and accepted the Recordership of Gloucester; and H. W. Cripps, Esq., of the Oxford Circuit, has been appointed in his place.

The Hon. C. P. Villiers has been appointed to the office of Judge-Advocate-General.

J. Pitt Taylor, Esq. has succeeded Mr. Chilton as Judge of the Greenwich County Court.

The Lord-Chancellor has appointed Mr. W. C. S. Rice, barrister-at-law, to be his Chief Secretary.

PARLIAMENTARY PAPERS.—From a return, lately published, it appears that the receipts from the sale of parliamentary papers in eight years—from 1844 to 1851—amounted to 40,682*l.* 14*s.* 1*d.* The rent of three offices, payment of clerks, &c., in the period came to 3,723*l.* 7*s.* 11*d.*, leaving the net produce 36,959*l.* 6*s.* 2*d.*

THE COMMISSIONERS IN LUNACY.—There has just been printed by order of the House of Lords, a paper containing the report made to the Lord Chancellor by the Commissioners in Lunacy, of visits to

insane persons during the six months ending the 4th of August last. Dr. Turner made 123 visits, saw 6,237 patients, and travelled 3,973 miles. Dr. Hume made 152 visits, saw 5,511 patients, and travelled 5,694 miles. Mr. Gaskell made 137 visits, saw 7,708 patients, and travelled 4,676 miles. Mr. Proctor made 100 visits, saw 5,115 patients, and travelled 3,809 miles. Mr. Mylne made 158 visits, saw 7,808 patients, and travelled 5,819 miles; and Mr. Campbell made 181 visits, saw 7,670 patients, and travelled 4,329 miles. These commissioners have 1,500*l.* a year, besides expenses, each, and the work they do for it would be dearly paid at one-third the amount. We look upon their office and pay as nearly a sinecure, and a gross job.

APPOINTMENTS, &c.

The Queen has been pleased to appoint Adam Murray Alexander, Esq., to be Second Puisne Judge of the colony of British Guiana.

THE CHANCERY COMMISSION.—Sir John Romilly, Sir George Turner, Sir Richard Kindersley, Sir John Dodson, the Right Hon. Stephen Lushington, Sir Charles Crompton, the Right Sir James Graham, Bart., the Right Hon. Joseph Warner Henley, Sir John Dorney Harding, Knt., Sir William Page Wood, Knt., Richard Bethell, Esq., John Rolt, Esq., and William Milbourne, Esq., barrister-at-law, are her Majesty's Commissioners for continuing the Chancery Inquiry, and for inquiring into the law and jurisdiction of the Ecclesiastical and other courts in relation to matters testamentary.

The Master of the Rolls has appointed Mr. Kenyon L. Parker, Q.C., to succeed Mr. Thomas Hall Plumer, deceased, as one of the Examiners in the Court of Chancery. The other Examinership, vacant (after many years' service) by the promotion of the Hon. C. P. Villiers, M.P., to the office of Judge Advocate to the Queen, is conferred upon Mr. C. Otter, barrister-at-law, of Lincoln's-inn. Both of these are good appointments. The salary is now 1,500*l.* per annum, and the work much too great for two Examiners to discharge.

Hubert Broom, Esq., the able author of "Law Maxims," &c., has succeeded Mr. Phillimore as Lecturer at the Middle Temple.

We understand that John F. Leith, Esq., of the Calcutta Bar, is appointed to succeed the late Mr. Empson, at Haileybury, as Professor of Law. This is a highly important office. The Court of Directors maintain a monopoly of judicial offices throughout the three Presidencies in India.

The sole education to fit the men appointed to these offices is that which is given at Haileybury. Is it not, under such circumstances,

peculiarly incumbent on the court to make that education as good as possible? Has it done so? Who is Mr. Leith, to whom the entire legal training and tuition of all the future judges of India has been intrusted? That he has been a member of the Bar of Calcutta, and has there only practised for the last twenty-two years, is of course deemed by the Directors a qualification, for he must necessarily have been practically imbued with all the narrow technicalities and local procedure to which our colonial courts are but too much addicted, and which it is so desirable to improve.

We are informed, moreover, that Mr. Morley was one of the candidates. He, however, laboured under the disqualification of being the best Persian scholar in England, an active member of the Asiatic Society, the author of the "*Digest of Indian Cases*," a most elaborate and able work on the whole administration of justice; the author of highly esteemed works on Oriental literature; and a lawyer in the broadest sense of the term, as his preface to the "*Digest*" amply proves.

If ever it was needed that a man of comprehensive legal science, and its adaptation to the practical experiences of these times and the enlarged rights of society, should direct the studies of the law students at Haileybury, it is needed now. How these requirements are to be achieved out of England, and in the course of constant practice in Bengalese courts, we certainly are at a loss to understand; but the public, and especially the Indian Empire, are concerned to know; and we trust that when the Charter is about to be renewed, this may be an item in the thorough discussion which the propriety of doing so will require.

CALLS TO THE BAR.

INNER TEMPLE, Nov. 17.—The following members of this society have been called to the Bar:—Charles Platt, B.A.; Charles Joseph Trupp, M.A.; Julius Talbot Airey, Esq.; Thomas Howard Fellows, Esq.; John Copley Wray, M.A.; Francis James Roughton, Esq.; William Eccles, B.A.; William Samuel Jones, Esq.; James Oliver, Esq.; George Alfred Lawrence, B.A.; Robert Heyrick Palmer, B.A.; John William Wray, Esq.; Simeon Jacobs, Esq.; Francis Newman Rogers, B.A.; George John Cayley, Esq.; Downes Wiglesworth, B.A.; the Hon. Robert Bourke; Donat John Haste O'Brien, B.A.; John Paxton Norman, M.A.; Charles Frederick Lucas, Esq.; Charles Neve Creswell, B.A.; Edward Bousfield Dawson, LL.B.; Charles Jeremiah Mayhew, Esq.; Richard Formby, B.A.; Edward Hacking, Esq.; Henry Francis Shebbeare, B.A.; William Henry Humphrey, B.A.; Ewark Gibbon Salisbury, Esq.; Thomas C. Mosson Meekins, B.A.; James John Hooper, Esq.; and Thomas Freeman Morse.

MIDDLE TEMPLE, Nov. 17.—Messrs. George Thornton Hamilton, Francis Talfourd, Charles Robert Hickes, Moreton Revell Phillips,

Frederick Watson Lloyd, John Whitcombe, William Philip Dymond, Thomas Dunnett, Henry Gawler, Joseph Graham, William Robert Wilkinson, and William Pearce.

LINCOLN'S-INN, Nov. 17.—Messrs. Richard Darrell Darrell, B.A.; Walter Bagcot, William Knox Wigram, M.A.; Frederick Boyd Marson, Codrington Thomas Parr, Edmund James, Arthur Benson Dickson, Samuel Greame Fenton, M.A.; Joseph Adderly Chichele Helm, Richard Elwyn, M.A.; Thomas Spicer Galland, M.A.; William Pulley, John Coryton, B.A.; and John Rowe Kelly Ralph, M.A.

GRAY'S-INN, Nov. 17.—Edward Bullen, Esq., of Trinity College, Dublin, M.A.

DOCUMENTS, &c.

CONFERENCE ON THE REFORM OF THE MERCANTILE LAW.

A conference was recently held at the rooms of the Society for promoting the Amendment of the Law, to consider the propriety of assimilating the mercantile laws of England, Ireland, and Scotland. There were deputations from the principal towns and law societies, and the following resolutions were agreed to:—

“That the mercantile laws of England, Ireland, and Scotland are scattered and disconnected, and in many instances dissimilar and even antagonistic; a state of things tending greatly to restrict and embarrass commerce, by producing uncertainty, perplexity, and delay.

“That it is highly desirable that a well-digested and well-arranged body of mercantile law should be framed and established for the whole of the three kingdoms.

“That, dismissing all local and even national prejudices, the assimilation and improvement of the mercantile laws of the three kingdoms, and the improvement and, where requisite, the assimilation of the procedure, should be effected by selecting those principles and rules, wherever they may be found, which shall be deemed the best and most beneficial to the commercial classes and to the community at large; and that to this end it is necessary carefully to examine the mercantile laws, and to have recourse to the experience of other countries.

“That it is desirable that this assimilation and improvement should be brought about by a general revision, amendment, and consolidation of the different branches of the mercantile law, taken successively; but that while these larger measures are proceeding, much immediate relief might be afforded by a series of single Acts, addressed to the more pressing and grievous evils, which Acts, by proper arrangements, might be made subservient to the ultimate object.

“That while this work is going forward it is important that no new measures of mercantile law should be introduced into Parliament but such as may apply generally to the three kingdoms, or serve as steps towards a general assimilation.

“That a commission, consisting of members of both Houses of Parliament and members of the legal and commercial professions, appears the most efficient means of obtaining the desired results.

"That the president, vice-presidents, and council of the Law Amendment Society, and the following gentlemen, Lord Wharncliffe, Lord Montague, Lord Ashburton, Viscount Goderich, &c., with power to add to their number, be appointed a committee to represent the views of this conference to her Majesty's Government, and to take such other measures as may from time to time appear necessary for carrying these views into effect.

"That this meeting recognises with pleasure and approval the efforts which have been made by other bodies besides the Law Amendment Society for the assimilation and improvement of the mercantile laws of the three kingdoms, but would suggest for the consideration of these bodies, whether their future efforts would not be more efficient if made in connection with those of the above-mentioned committee."

CRIMINAL STATISTICS OF 1851.

THE criminal tables for the past year, which have just been published, afford pleasing evidence that the decrease of crime, as compared with the amount ten years ago, continues to be maintained. For, although the slight increase of 4·2 per cent. marks the returns of 1851 as compared with those of 1850, the increase of population may be most fairly adduced as a satisfactory cause for this increase. The commitments during the last ten years stand thus:—1842, 31,309; 1843, 29,591; 1844, 26,542; 1845, 24,303; 1846, 25,107; 1847, 28,833; 1848, 30,349; 1849, 27,816; 1850, 26,813; 1851, 27,960. Total, 578,623.

The increase of 4·2 per cent. during the past year has not been confined to any particular localities. It extends generally over England and Wales, including all the chief agricultural and the largest manufacturing and commercial counties. In 1841 the commitments were in the proportion of one in every 573 of the population, while, according to the last census returns, the proportion in 1851 is reduced to one in 641. Between these two periods the population increased 12·6 per cent. while the commitments remained as nearly as possible stationary, their increase amounting only to a fraction per cent. But the relative progress of population and crime has been very different in different parts of England. In the large manufacturing districts, where the working classes during the past year have been steadily employed, the proportion of commitments to the population has signally decreased. Thus, in Yorkshire and Lancashire, the population during the last ten years has increased 18·2 per cent. while the commitments have simultaneously decreased 4·3 per cent. In Cheshire, Derbyshire, Nottinghamshire, and Leicestershire, where, mixed with a considerable agricultural population, the chief silk, lace, and other textile fabrics are produced, the proportion of the commitments decreased from 1 in 579 to 1 in 633, the population having increased 7 per cent. while the commitments decreased 2 per cent. In Staffordshire, Warwickshire, and Worcestershire, the seat of the chief manufactures in hardware, pottery, and glass, the commitments decreased from 1 in 435 of the population to 1 in 552, the population having increased 20·4 per cent. and the commitments decreased 5 per cent.

In the more purely agricultural counties the progress is lower, and the results less favourable. In the eastern district, comprising Essex, Norfolk, Suffolk, and Lincoln, the proportion of the commitments to the population has increased from 1 in 669 to 1 in 604; the increase of the population being 6·8 per cent. and of the commitments 18·4 per cent. Of the seven chief midland agricultural counties, Cambridge, Northampton, Bedford, Hertford, Oxford, Bucks, and Berks, the proportion of commitments has decreased from 1 in 572 to 1 in 620; the increase of the population being 10·3 per cent. and of the commitments 1·8 per cent. only. In the counties in the south and south-west, Hants, Wilts, Dorset, and Somerset, the result proves more favourable than in any of the other agricultural districts. The proportion of the commitments to the population has decreased from 1 in 508 to 1 in 651; the population having increased 12·5 per cent. and the commitments decreased 12·1 per cent.

On a comparison of the offences upon which the increase of the commitments last year has arisen, it appears that the increase has extended to each of the classes of crime, with the exception of the sixth class, comprising miscellaneous offences. In the first class, offences against the person, the commitments for murder, attempts to murder, wounding &c., remain stationary; unnatural offences, however, show an increase, as do those under the head of lesser offences of assault. In the second class, offences against property committed with violence, the commitments have been without change, except the marked increase of robbery, the tendency of the whole class, on a more extended comparison, being to an increase. In the third class, offences against property committed without violence, which contains the great bulk of the commitments, there is an increase of three per cent. arising chiefly in the commitments for larceny from the person and for frauds. The fourth class, malicious offences against property, although comprising a very small comparative proportion of the commitments, yet exhibits a marked increase, particularly under the heads of incendiarism and obstructing railway carriages. In the fifth class, forging, and offences against the currency, there is a considerable increase, particularly under the head of uttering counterfeit coin, which offence has increased thirty-six per cent. on a comparison of the totals of the last two five years.

The effect of the Act of Parliament passed in 1849 to repeal the punishment of transportation on the first conviction for simple larceny, is more fully exemplified by the returns of last year. The capital sentences in 1851 are above the yearly average since 1841, when the last alteration of the law abolishing capital punishments took place. This increase arises chiefly on the offences of burglary and robbery, attended with personal violence or injuries. Of the seventy persons capitally convicted last year, the sentence was recorded against fifty-three, sentence of death upon seventeen; and of these seventeen, ten were executed, two of them being females. The proportion of crime among females has shown a slight tendency

to increase on the last three years. The proportions are as follow :— 1848, 23·4 females to 100 males ; 1849, 24·1 ; 1850, 24·4 ; 1851, 24·8. In the offences against the person the proportion of females last year was 13·4 to 100 males. In murder the large and increasing proportion of females, arising from the many cases of poisoning, has been much remarked. The number last year was, forty-one females to thirty-three males.

NECROLOGY.

October.

BULLER, Thomas Wentworth, Esq., commander, R.N., and one of her Majesty's Tithe and Inclosure Commissioners for England and Wales, on the 30th, at Strete Raleigh, Whimble, Devonshire, aged 60.

November.

BARTON, George, Esq., of the Middle Temple, barrister-at-law, on the 1st, at Bowdon, Cheshire.

CHILTON, George, Esq., Q.C., on the 1st, at Boulogne, aged 56. Leader of the South Wales Circuit, Judge of the Greenwich County Court, and Recorder of Gloucester.

December.

GIBSON, Rowland, Esq., barrister-at-law, at Gray's-inn, on the 16th, at Park Village East, Regent's-park.

BALLANTINE, Mr., on the 20th, who was for twenty-seven years one of the magistrates of the Thames Police Court, died at his residence, in Cadogan-place, Chelsea, after several months' severe illness. The deceased gentleman, who was in his 74th year, was called to the Bar in 1813. He was a very intelligent and popular magistrate, and for many years had the chief control and management of the river police, a force which he left in a state of great efficiency, when it was placed under the Metropolitan Commissioners, in Scotland-yard, on the passing of the last Police Act.

BLOXSOME, Edward, Esq., for fifty-three years deputy clerk of the peace for the county of Gloucester, on the 26th, at his residence, the Rangers, Dursley, aged 80.

January.

ENGLEHEART, William Hayley, solicitor, second son of Nathaniel Brown Engleheart, Esq., of Doctors' Commons and Blackheath, on the 8th, at his father's residence, aged 38.

SHARMAN, Alexander, Esq., solicitor, on the 9th, at Bedford, aged 51.

Correspondence.

TITHE COMMUTATION.

TO THE EDITOR OF THE LAW MAGAZINE.

SIR,—As your agricultural as well as clerical readers may feel anxious to know the result of the corn averages for the seven years to Christmas last, published in the *London Gazette* of this evening, viz.—

	s.	d.	
Wheat	6	0½	per imperial bushel.
Barley	3	9½	"
Oats	2	6½	"

I beg to state for their information that each 100*l.* of tithe rent-charge will, for the year 1853, amount to 91*l.* 13*s.* 5½*d.*, which is a reduction of more than two per cent. from last year's value.

The following statement from my *Annual Tithe Commutation Tables*, will show the worth of 100*l.* of tithe rent-charge for each year since the passing of the Tithe Commutation Act, viz.—

	£.	s.	d.
For the year 1837	98	13	9½
" 1838	97	7	11
" 1839	95	7	9
" 1840 ..	98	15	9½
" 1841	102	12	5½
" 1842	105	8	2½
" 1843	105	12	2½
" 1844	104	3	5½
" 1845	103	17	11½
" 1846	102	17	8½
" 1847	99	18	10½
" 1848	102	1	0
" 1849	100	3	7½
" 1850	98	16	10
" 1851	96	11	4½
" 1852	93	16	11½
" 1853	91	13	5½
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	£1,697	19	4½

General average for 17 years, £99 17 7½

I am, Sir, yours &c.

CHARLES M. WILlich.

25, Suffolk-street, Pall-mall East, 7th Jan. 1853.

List of New Publications.

Addison—A Treatise on the Law of Contracts, and Parties to Actions *ex Contractu*. By G. C. Addison, Esq., Barrister. 3rd edition, 2 vols. royal 8vo. 1l. 18s. boards.

Archbold—The New Practice, Pleading, and Evidence in Common Law at Westminster, as regulated by the New Statute of 1852, with all the necessary Forms. Royal 12mo. 25s. boards.

Archbold—Pleading and Evidence in Criminal Cases, with the Statutes, Precedents of Indictments, &c., and the Evidence necessary to support them. By John Jervis, Esq., Barrister. 12th edition, including the Practice in Criminal Proceedings generally. By W. N. Welsby, Esq., Barrister. Royal 12mo. 24s. cloth.

Bankruptcy—New Rules and Orders in Bankruptcy, as approved by the Lord Chancellor. 12mo. 2s. sewed.

Bankruptcy—Rules and Orders in Bankruptcy, dated 19th October, 1852; with Schedules of Forms in full, Explanatory Notes, and Index. By a Barrister. 12mo. 3s. 6d. sewed.

Cooper—The Chancery Acts and Orders of 1852, with copious Indexes. By C. P. Cooper, Esq., Q. C. 12mo. 3s. sewed.

Cooke—The Law and Practice of Copyhold Enfranchisement, with Forms authorized by the Copyhold Commissioners. By G. W. Cooke, Esq., Barrister. 12mo. 10s. 6d. boards.

Colquhoun—The Roman Civil Law. By P. Colquhoun, Esq., Barrister. Vol. ii. Part 4. Royal 8vo. 10s. 6d. sewed.

Chitty—The Rules of Practice in Civil Actions of the Superior Courts of Law, made by the Judges in Hilary Term, 1853. By T. Chitty, Esq., Barrister. Royal 12mo. 2s. sewed.

Chitty—Forms of Practical Proceedings in Queen's Bench, Common Pleas, and Exchequer of Pleas, adapted to meet the alterations in the Practice effected by the Common Law Procedure Act; with Notes and Observations thereon. By T. Chitty, Esq., Barrister. Part 1. Royal 12mo. (To be completed in two parts.) 14s. sewed.

Carpmael—Law of Patents for Inventions. By W. Carpmael. 5th edition. 8vo. 2s. 6d. sewed.

Dearsley—Criminal Process. By H. R. Dearsley, Esq., Barrister. 12mo. 4s. boards.

Greening—The Common Law Rules of Hilary Term, 1853; Table of Officers' Fees, and Two Statutes in relation to Notices of Action, Costs, &c., intended as a Supplement to Forms of Declarations, Pleadings, and other Proceedings in the Superior Courts of Common Law. By Henry Greening, Esq., Special Pleader. 12mo. 1s. 6d. sewed.

Greening—Forms of Declarations, Pleadings, and other Proceedings in the Superior Courts of Common Law, with the Common Law Procedure Act, 1852; and the New Rules of Practice of Hilary Term, 1853, with Notes. By Henry Greening, Esq., Special Pleader. 2nd edition. 12mo. 10s. 6d. cloth.

Gordon—Nisi Prius Trials at Assizes, and Motions for New Trials in Banco; a few Suggestions thereon. By T. Gordon, Esq., Barrister. 8vo. 6d. sewed.

Kerr—The Common Law Procedure Act, 1852, with Practical Notes, illustrated by Precedents of Pleadings, and Forms of Affidavits, Notices, &c., framed under the Statute; with an Introduction explanatory of the Changes effected in the Practice of the Superior Courts, &c. By R. M. Kerr, Esq., Barrister. 2nd edition. 12mo. 12s. cloth.

O'Dowd—The New Chancery Practice, as founded on the several Acts and Orders for the Improvement of Equity Procedure, 1852; together with all the Acts and Orders themselves to the latest Period. By J. O'Dowd, Esq., Barrister. 2nd edition, incorporating Cases under the Acts, and otherwise much improved. 12mo. 7s. 6d. boards.

Power, Rodwell, and Dew—Reports of the Decisions of Election Committees of the House of Commons during the Fifteenth Parliament of the United Kingdom. By D. Power and H. Rodwell, Esqs., Barristers, and C. L. Dew. 12mo. 14s. cloth.

Quain and Holroyd—The New System of Common Law Procedure, according to the Common Law Procedure Act, 1852. By J. R. Quain and H. Holroyd, Esqs., Barristers. 12mo. 7s. 6d. cloth.

Starkie—A Practical Treatise on the Law of Evidence. By T. Starkie, Esq., Barrister. 4th edition. By G. M. Dowdeswell and J. G. Malcolm, Esqs., Barristers. Royal 8vo. 17. 16s. cloth.

Sleigh—The Grand Jury System. By W. C. Sleigh, Esq., Barrister. 8vo. 1s. sewed.

Shelford—Supplement to Chancery Acts and Orders. By L. Shelford, Esq., Barrister. 1s. sewed.

Story—Commentaries on the Conflict of Laws, Foreign and Domestic. 4th edition. By Joseph Story, Esq., royal 8vo. 17. 11s. 6d. cloth. (Boston, U. S.)

Tudor—The New Chancery Acts, and New Orders for 1852. By O. D. Tudor, Esq., Barrister. 12mo. 8s. 6d. cloth.

Weigall—The New Practice of the Court of Chancery, as introduced by the Acts of Parliament of 1852, and the Orders of Court, with Costs, Forms, and an Index. By J. C. E. Weigall, Solicitor. 8vo. 6s. cloth.

Williams—Principles of the Law of Personal Property, intended for the Use of Students in Conveyancing. By J. Williams, Esq., Barrister. 2nd edition. 8vo. 16s. cloth.

Willmore—Confusion worse Confounded, or the Statutes at Large in 1852. By G. Willmore, Esq., Barrister. 8vo. 1s. sewed.

THE
LAW MAGAZINE;
OR,
QUARTERLY REVIEW
OF
Jurisprudence.

ART. I.—TREATMENT OF CRIMINALS.

Crime; its Amount, Causes, and Remedies. By Frederick Hill, Barrister-at-Law, late Inspector of Prisons. London: Murray, Albemarle-street, 1853.

Results of the System of Separate Confinement, as administered in the Pentonville Prison. By John T. Burt, B.A., Assistant Chaplain, formerly Chaplain to the Hanwell Lunatic Asylum. London: Longman, Brown, and Green. 1852.

Juvenile Delinquents; their Condition and Treatment. By Mary Carpenter. London: W. Cash. 1853.

District Farm Schools for Parochial Unions. By Jelinger C. Symons, Esq., H. M. Inspector of Union Schools. London: Published by Authority.

THE subject of this article has been often before our readers, but never has it been so prominently before the public. In addition to the committee still sitting on the subject of juvenile offenders, we have no less than three voluminous publications on the subject which head this article.

Mr. Hill's book is the most important. It is admitted on all hands that secondary punishments must be revised. Mr. Hill is of the same opinion, though he thinks that crime itself is on the decrease.

We propose to give the opinions of each of these writers on the three great branches into which the subject divides itself, namely, the extent of the evil of our present penal system, and the means of remedying it, both as regards adults and children.

Mr. Hill, in speaking of the returns of crime, however, says :—

"Nothing can be more fallacious than taking the returns from time to time of the number of persons apprehended, and of the offences of which they are convicted, as indications of the comparative amount of crime: yet this fallacy is still commonly persisted in. These returns take no notice of the increase of population, the greater efficiency of the police, the increased willingness to give evidence (arising in part from a diminished fear of maltreatment), a less reluctance to prosecute (owing partly to the abolition for many offences of the punishment of death, and to the State now taking upon itself in England the chief and in Scotland the whole expense of prosecution), and they take no account, also, of the increase of wealth, and the changes in what the law declares to be crime.

* * * *

"It is, I say, from such wretched data as these (he adds) that the melancholy conclusion is drawn, that the progress of civilization, so far from amending public morals, has even been productive of a positive increase of crime."

There is no doubt that crimes are increasing in gravity as well as number,¹ and that nothing can be more groundless than the assertion that they, who like ourselves for instance, have used the statistics of crime, have taken no notice of the *increase of population*. It has been invariably stated in the elaborate calculations we have from time to time given on this subject. The greater efficiency of the police, is a mere assertion: we entirely disbelieve it. In many places, on the contrary, the police connive at thieving, as is well known, and receive shares as hush-money. That they are more efficient than they were is against all experience; nor is there any less reluctance to prosecute. The increase of wealth ought not to be taken into account. The changes in what the law declares to be crime are all on the side of diminution, and can newise account for an increase of crime.

No one ever said that "civilization" caused crime, but most assuredly an imperfect education does. Mr. Hill himself seems to be well aware how deficient a good deal of the education has been which goes by that name, and therefore ought not to have made the mistake he does in confusing it with civilization.

¹ [We will prove this when the Tables for 1852 are published.—Ed.]

He, however, properly enough, defines what education ought to be.

"I do not mean the mere capability of reading and writing, but a systematic development of the different powers of the mind and body, the fostering of good feelings, the cultivation of good principles, and a regular training in good habits. Such an education necessarily includes industrial occupations, and giving a taste and aptitude for useful employment; so as to prepare the scholar to earn a livelihood without that severe and constant labour by which alone the ignorant or clumsy workman can obtain an honest subsistence, and from which he too often recoils and flies to crime."

Can Mr. Hill point to a single assertion that such an education as this produces crime? Such an education is, however, with few exceptions, a theory,—to have fruition, perchance, in another generation; but which will scarcely do more than take root in this. A smattering instruction in mere reading and writing, as has been over and over again proved, has done much to increase crime; but is it rational to confuse this with *civilization*, or to say that we ascribe crime to it? It is a childish mode of assailing a truth too strong to be fairly met.

Mr. Hill considers the causes of crime also, to be—

"Bad training and ignorance, drunkenness and other kinds of profligacy, poverty, habits of violating the laws engendered by the creation of artificial offences: other measures of legislation interfering unnecessarily in private actions, or presenting examples of injustice: temptations to crime caused by the probability either of entire escape or of subjection to an insufficient punishment."

In speaking of the bad training as one of the principal causes of crime, Mr. Hill says that—

"There may be a few exceptions to this rule, as occasionally well-instructed, and apparently well-trained men may be found among criminals;" but he says, "generally speaking, they are grossly ignorant, or possess a smattering of 'undigested knowledge of little real value.'"

Mr. Hill gives the evidence of many who have had ample opportunities of judging of the state of poverty and ignorance among juvenile offenders, and who support his opinion of their forming two among the six enumerated incentives to crime. The following is an extract from part of a letter from the governor of the Edinburgh Gaol to Mr. Hill:—

"During the last three years 740 children, under fourteen years of

age, were committed to this prison for crime. Of that number, 245 were under ten years of age. The most of these had been the victims of the unkindness and neglect of others. Some of them had no parents, and were uncared for by any one. Others were the children of widowed mothers, receiving a most inadequate out-pension from the parish, and obliged to supplement the miserable pittance at the expense of the moral well-being of their families, by going out to work, and leaving their children unrestrained in their houses. They have thus grown up in ignorance, are dissipated and worthless; far from preventing, they instigate their children to the commission of crime, their example and precept are wholly evil, and their very existence a calamity to their offspring."

Mr. Hill, in confirmation of these remarks, says how few "skilled artizans or well-trained husbandmen" are to be found in gaol, for prisoners generally are either "day labourers, butchers, and carters, and other persons engaged in employments bespeaking the lowest order of talent and knowledge."

Mr. Hill's view of the ignorance of these classes is also fully entertained by Miss Carpenter, who in the first chapter of "Juvenile Delinquents," says,—

"They are not only *perishing* from lack of knowledge, from lack of parental care, of all that should surround childhood, but they are positively become *dangerous*; — dangerous to society, which rises in formidable array to defend itself against them, and in a condition most dangerous to the world around, to succeeding generations, and to their own souls."

Miss Carpenter divides young criminals into five classes, the first of which she says,—

"Consists of daring, hardened young offenders, who are already outlaws from society, caring for no law, divine or human, perhaps knowing none: they live notoriously by plunder; their hand is against every man, and every man's hand is against them."

We cannot agree with Miss Carpenter that the existence of these dangerous classes "betokens a strange apathy to evil," for we do not hesitate to say that if there ever was a time when the interests of the dangerous juvenile classes were taken into consideration, that time is now.

We can hardly read the accounts of our Ragged Schools, the Birmingham Conference, our London and City Missions, the Committee on Juvenile Offenders, our Philanthropic Schools, our District Farm Schools, the Poor Law Union Schools, the

Pastoral Aid, and other societies which evince a zeal for the improvement of the poor and destitute classes, and say that "there is a strange apathy to evil in our civilized land;" we agree far more in the assertion that there is "a strange want of power to grapple with it:" for though we think that the apathy is rapidly disappearing, we are perfectly well aware that more may be done, and we hope we are not presumptuous in saying more will be done. It is right to stimulate to renewed effort and better progress, but we do not concur in the policy or justice of depreciating or ignoring the Christian zeal and philanthropic effort really at work, and from which we augur the best results.

Miss Carpenter considers the second class—

"If possible more dangerous than the first, because more systematic in their life of fraud, and often less distinguishable by their external appearance and manner. These are youths who are regularly trained by their parents or others in courses of professed dishonesty, some as pickpockets, others as coiners, or in such varied modes of depriving their neighbour of his property, as their peculiar circumstances may suggest."

The third class, though not *trained* to crime, have learned to pick and steal, owing to their not having received any moral and religious training, and from not having been brought up to habits of honest industry, so as to "learn and labour to get their own living;" and this mode of living the authoress thinks "will lead ere long to daring violation of the law."

The fourth class, says Miss Carpenter,—

"Will consist of those who have been actually driven into crime by their utter destitution, by their being thrown on the world without any to care for them, while their claims on support from the National Poor Laws have been either passed by unnoticed, or rejected by the administrators of those laws."

The fifth class, parents and children, live in the greatest poverty, and are contented to hawk about "small wares;" and, as Miss Carpenter truly observes, "indignantly repel any one who should interfere with them, young as they are, in the exercise of their lawful calling."

Miss Carpenter totally dissents from the generally received opinion that "poverty and destitution are the great causes of

juvenile crime." She says that facts carefully considered will lead to a very different result, at any rate with respect to that crime which is indicated by conviction and punishment.

She thinks the following a most convincing proof of her argument against poverty being an "inciting cause to crime." In the report of the Parkhurst prison for 1844, out of the whole number of convicts (957) 732 had been at day schools for upwards of a year, while 30 only had never been at all at school, 163 had received instruction for five years; 27 others had been in a work-house school. Thus says Miss Carpenter:—

"It follows that only a very small proportion of these boys belonged to the class admissible to ragged schools, from being unable, through destitution, or loss of character, to attend the day schools; still less did they belong to the three classes of juvenile thieves who may allege poverty as an inciting cause to crime."

We rather agree with this argument, as every one must be well aware that many of the *poorest* classes will deprive themselves of *real necessities* in order to obtain a little schooling for their children; while others, who are better able to afford it, are content to let their children wander about the streets, and become a nuisance to themselves and their neighbours.

As to the remedies for the evils thus fully portrayed, let us first direct our attention to the removal of juvenile pauperism. Instead of sending our merely destitute children to the work-house, let us give our willing aid to the efforts of those inspectors of Union Schools who have been furthering to the utmost the erection of District Farm Schools. Their views are as follow:—

"The child, when he becomes chargeable, will be removed to the school instead of to the workhouse; thus he will know no more of the latter and its comparative comforts than other children. In after-life he will start on a par with the independent labourer, who knows nothing of the workhouse but its bad name, and who strives might and main to maintain the independence he has never lost. The district schoolboy will be just as little acquainted with what a workhouse is. It will be just as little his former home, and it will be just as much his future dread. He cannot in after-life look back on his school as a resource; unlike the workhouse, its doors close on him with his boyhood. The *man* cannot return to *school*. He will be rescued, moreover, from much of the reproach of pauperism, as well

as from the contamination of a workhouse. Surely these are great aids to future independence and diminished rates!

"The system of discipline will, it is to be hoped, instil habits of useful industry just as effectually as the workhouse does habits of idle dependence.

"We will not dilate at any great length on the system which should be pursued in a district farm-school. * * * Suffice it to say, that the system should be a regime of hard, healthful, and useful labour; it should be one, moreover, of *instructional industry*. The children of both sexes should be taught *how to do things well*, and *why* each thing is done, in every office they perform. For this purpose the superior officers should themselves train the servants, who will personally impart such instructions, and participate in the labour; in every portion of which, whether in-door or out-door, the ruling principle of the establishment should be *to make the children themselves do the work*."

Their pursuits would be chiefly the following:—

- | BOYS. | GIRLS. |
|---|--|
| 1. Spade husbandry in all its branches. | 1. Household work of all kinds, including cooking. |
| 2. Attending to the cattle, pigs, and horses. | 2. Dairy work (for eldest girls). |
| 3. Tailoring, shoemaking, baking. | 3. Washing and ironing (<i>idem</i>). |
| 4. Preparation of flax for the spinners. | 4. Needlework. |
| | 5. Spinning flax. |

Moral training should pervade the entire system of labour and instruction from morning till night. The practice of true religion should imbue the whole system. The teachers, moreover, must be fitted to obtain a hold on the hearts of the children.¹ There can be no efficient moral discipline without it, especially over a class of children who are for the most part morally as well as physically morbid. It is on this account that an efficient and peculiar system, such as district schools can alone impart, is especially needed for pauper children. It is no ordinary province of education to eradicate habitual pauperism.

The 7 and 8 Vict. (ss. 40 *et seq.*) provides ample means for effecting these benefits by combinations of unions for the formation of district schools, and sets forth the mode of creating, maintaining, and governing them, as well as the staff of the establishments. It leaves their adoption, in the first instance,

¹ Stow's Glasgow system is pre-eminently fitted for this class of school.

to the Guardians themselves, of whom a majority in each Union must sign consent. It provides that a district Board, elected from the rate-payers, shall exercise the same control over it that the Guardians do over the Union workhouses.

The Guardians of each Union combining are empowered either to rent or buy land, and erect buildings for the purpose of the school, to borrow money to be repaid in instalments during twenty years, and to levy rates, according to the last averages, for all necessary expenses.

The subsequent Act of 11 and 12 Vict., c. 82, removes all limitation of area and number of Unions, and of rates levied for the maintenance of these schools.

We object to leaving a measure so essential for the repression of pauperism in the next generation, to the hypothetical benevolence and foresight of Farmer Guardians, a body quite sufficiently numerous to render any voluntary measure perfectly hopeless. District Pauper Schools should be made compulsory after a probationary interval, in the same way as the tithe commutations.

Mr. Pashley, in his able work on poor laws, fully supported this view.

Miss Carpenter, throughout her book, refers so continually to Mr. Fletcher as an authority on the subject, that we are compelled very reluctantly to say that Mr. Fletcher, though a most active inspector of schools, and a most diligent and laborious statistician, never was an authority, nor had any kind of personal experience, which could entitle his opinion on penal discipline to the weight Miss Carpenter attaches to it. We are at a loss to find how or when he made the "close study" of "the continental Farm Schools" she attributes to him. The only evidence he ever gave of any attention to the subject is his pamphlet on the Farm School system of the continent, published last year. It contains, no doubt, most valuable information on the subject, and well it may, for it is entirely collected by Monsieur Ducpetiaux, "and given in his own words," as Mr. Fletcher very properly avows in page 6 of his pamphlet. Monsieur Ducpetiaux was specially charged by his government (the Belgian) to collect and publish the result of *his* really laborious

and personal inquiries, and Mr. Fletcher has translated and abstracted them very usefully. As to being himself an authority on the subject, it would have required experience, which neither his vocation nor his opportunities afforded him.

Of pauper children Mr. Fletcher knew even less than he did of criminal children. He was an inspector *exclusively* of Dissenting, or British and Foreign Schools; and probably never was in six workhouse schools in his whole life; and so little did he know of their requirements that in one of his last reports he recommended (in the teeth of the Poor Law School Inspector's repeated and elaborate recommendations, and of the results of M. Ducpetiaux's experience), that District Schools for pauper children should be small. To make them so, would so enormously increase their cost as to render them wholly impracticable. Nevertheless, Miss Carpenter, after justly lamenting Mr. Fletcher's death, says, "May others be raised up to carry on *his* labours in behalf of the *pauper* and morally neglected children of our own country!" Fortunately, they who did so when Mr. Fletcher was living, are living still, and are hard at that very work; and, for the last five years have devoted themselves to that especial province, and by whose effort facilities have been offered for the erection of District schools, whereby juvenile paupers may really be enabled to emerge from the pauper status, instead of, as at present, being inured to and reared in it.

Mr. Pashley, in his very able book, though he fully recognises the principle of industrial training for this class of children, seems wholly unaware of the elaborate discussion the subject has undergone in the Parochial Union School Reports, published by the Committee of Council on Education; they are worth his perusal.

That objections have been and will continue to be raised to this plan for securing the honest industry of these destitute classes, we do not for one moment doubt, but let not the better judgments of those who are so deeply interested in their welfare, be warped by the common and vulgar arguments raised by a few of the old squirearchy and prejudiced guardians, who, it is well known, never look one inch beyond the present expenditure.

Miss Carpenter, in speaking of remedies for the criminal children, says, in which we quite agree with her, that—

“It is no empirical system which must be employed towards these children : no well-meant, but misguided sentimental kindness will convert them ; nor will a few months, or even a year, generally suffice to eradicate evils which have been the growth of their life. The system adopted must be one founded on God’s own immutable laws : the kindness shown must be in accordance with these, and spring from a deep fountain of love in the heart ; the period occupied in the cure must be limited only by the degree in which the remedies employed produce their due effect on the patient.”

Some people seem to think that much good may be effected towards the reformation of offenders in ordinary prisons ; we are rather disposed, as regards the young, to agree with Miss Carpenter, that “the very name of a prison school is an anomaly.” We think much more may be done in establishments like those at Meltray, the Raue Haus, that at Hofwyl, and the American Reformatory Schools ; for we feel sure, that where manual and industrial labour are pursued out of doors, and made attractive to the children, we shall be more likely to reform and reclaim them than they ever could be in the walls of a pent-up prison, where we sometimes hear insanity has been the result of our “discipline,” where it exists, and certain corruption the result of our want of it, where it does not.

Mr. Burt, assistant chaplain at the Pentonville prison, startles us by saying, in his able work on the “Results of the System of Separate Confinement,” that since the relaxation in the discipline has taken place, “insanity has increased, and the physical health has not improved.” We must say this is rather difficult to understand ; he confirms it by saying that, “under the altered system, insanity has been eight times greater than during the four preceding years, when the original system was in full operation.” He goes on to say that “the amount of insanity has been greatest in those classes in which the amount of collective moral instruction has been least.”

Mr. Burt draws a very clear distinction between separate and solitary confinement, which he thinks is not generally sufficiently understood. In solitary confinement the prisoner never sees or converses with any one. In separate confinement he is

justly kept aloof from his fellow prisoners, but is allowed to converse at times with the officers of the prison and the chaplain. Mr. Burt, in upholding separate confinement, says,—

“I advocate an adherence to the Separate System in its integrity, because under this discipline more than under any other, at the least cost to the State, and with the least injury to the criminal, kindness may be combined with severity, the influences which most counteract reformation may be excluded, the most powerful motives to virtue may be brought to bear upon the prisoner, and the rules for living virtuously may be most successfully inculcated. By these means all that can be done by human agency will be done, to achieve the great ends at which a Christian State ought to aim in the infliction of punishment upon its criminals.”

Mr. Hill proposes a general plan of improvement, by which

“All direct power with regard to the prisoners should be transferred from the Justices of the Peace, as a body, to the Visiting Justices.”

He further suggests,—

“That England may now with perfect safety take a step in advance of Scotland, and establish a complete system of prison management, under the entire direction of a department of Government (acting through the instrumentality of a small Board), obtaining thereby that full responsibility which attaches only to undivided power.”

He is very decided also in his opinion, that

“Everything seems to mark the *present* time as favourable for establishing a broad and comprehensive plan for providing and regulating prisons efficient in operation and economical in cost.”

There is no doubt of it. So far, however, from any progress at present, that essential part of reformatory discipline,—the reward of reformation,—is nearly withheld.

“The introduction of the *second stage of punishment* has effected a great change in the *prospects* of the prisoners. Originally the prisoner was transported directly from the separate prison to the colony, where he would be removed, as far as practicable, from his former companions in crime, and where he had a reasonable prospect of earning an honest living. At that time, everything was done that could be done, first, by the severity and reformatory influence of the system, to induce him to reform; and then to secure to him the fruits of reformation. Under the existing arrangements, the prisoners are removed from the separate discipline to the hulks or other public works, there to undergo an intermediate imprisonment, in the society of other criminals, often old associates, for terms ranging, according to the length of sentence, from one year to five, and even to ten years. When that second stage of punishment is past, they are to be transported with tickets of leave; but in the present attitude of the colonies it would be unjustifiable to

betray the desponding and confiding convict into any sanguine hopes of well-doing from that remote indulgence. Thus, while at first the prospects of the convict were definite, and, within reasonable limits, encouraging to reformation, now, the hope which formally sustained him under contrition, and stimulated him to better resolutions, is rendered uncertain and remote.

"Such have been the infringements upon the integrity of the original system. Their expediency upon the grounds of health and economy will be subsequently investigated; our first inquiry is as to the moral results.

"That the introduction of the alterations described has been followed by a great decrease of reformation is a matter of fact, which has been already shown."—P. 44.

It is a matter of extreme regret that so it should be.

The time has come for the establishment of industrial penal institutions on a large and effective scale. St. Helena would afford an admirable locality for one. This would combine all the requisites of reformation and correction, for it is essential to keep up the terror of transportation as a deterring punishment. Other islands might be selected for milder offences, and thus the large colonies would be exempted from the curse of a constant influx of criminal population, with its attendant depravities and demoralization. The great object should be to improve transportation, not to dispense with it. There is no other secondary punishment half as effectual. We have heard of an infinity of evils, and abuses, and shortcomings in the present, or rather past, system pursued in our penal settlements; but, strange to say, we have heard but little of any efforts to amend it, and to render the discipline there really reformatory. Whatever can be done at home to render it so can be done quite as well, and on some accounts, far better, in a colony.

We have a great notion that Captain Maconochie's plan, a little modified, would answer well.

To return to Mr. Hill's proposals, which are so general in their character, that they partake more of the features of a millennium than of a remedy for a specific evil; he says that—

"They consist chiefly of good education and the general spread of knowledge; the cultivation of habits of forethought, sobriety, and frugality, with the control of the passions; the promotion of habits of industry and self-reliance, and the adoption of all other practicable means for raising every class of society beyond the sphere of destitu-

tion, and into that of comfort and moderate wealth ; such a remodeling of our laws as shall bring the statute book as nearly as possible into coincidence with the eternal principles of justice, so that while it is a code of municipal law, it may also serve as a manual of morality ; and, lastly, the adoption of such means as shall secure, as far as practicable, that every offence be followed by immediate detection and certain conviction, and the criminal brought deeply to regret the wrong he has committed, and to labour earnestly in the work of reformation, and in obtaining the means for making restitution to the person whom he has injured."

Mr. Hill concludes by saying that :—

"If the provision and management of prisons were wholly national, almost every kind of improvement could readily be carried into effect ; and that in the safest manner, by first trying the plan on a small scale under the best circumstances for affording a trustworthy result, and then as experience might suggest, gradually extending its operation. By such an arrangement too, with the institution of a public prosecutor, the appointment of local criminal judges, the amendment of the criminal law, and the establishment in all parts of the country of an efficient police, with a reserved force to act in cases of internal tumult, and (as a militia) to defend the country from foreign aggression, the Government would be placed in a position effectually to discharge its great function of protecting the lives and property of the Queen's subjects ; while, by creating the motives that have been suggested for securing to every child an efficient education, by adopting the measures that have been proposed for freeing the country from mendicity, and by withdrawing from the statute-book every remaining law which diminishes the reward of honest industry, or otherwise wars against justice, I would fain hope that there would eventually be diffused through the land such an amount of virtue, contentment, and happiness, as would obtain for our country, with the willing consent of the whole civilized world, the noble office to teach the nations how to live."

All this is very good and very patriotic, but much too general to be practically useful. We want an amended reformatory system of prisons at home, where hard work and effectual moral training shall be combined with every kind agency which can be set to work on the heart. Secondly ; for the worst class of offences we want an amended system, on a similar principle, in the colonial islands, so as to amend and retain the punishment and terrors of transportation. For the young offender at home, we believe, nothing can be better than some such plan as Miss Carpenter's. We gave a draft of a bill in our last number, which might form the skeleton of such a scheme.

Mr. Hill's special remedies are sometimes meagre, and almost petty; at least in scope,—though always good in principle. Here are specimens:—

1. The police should not have such large premiums for the apprehension of offenders. He thinks that—

“So long as the police receive large premiums for the apprehension of great criminals, it is evidently their interest (although many of them are, no doubt, too honourable to be so swayed) that great criminals should exist; their motive for the extinction of such offenders being scarcely greater than that of a poacher for the extirpation of hares and pheasants. And great as is this objection to the practice of offering such rewards, it is not the greatest; for the terrible cases of ‘blood-money’ that have sometimes come to light; show that official villains have been found, under the stimulus of these rewards, to get up evidence against persons who were wholly innocent.”

We do not understand this reasoning at all. Is it meant that these mostly honourable policemen, who will not be swayed, nevertheless will be swayed by the premiums, and keep up in some inexplicable fashion the breed of felons and a crop of great crimes? It seems to us that the great premium cannot be got without the committal of the great offender; how, then, is this compatible with having no further motive for their apprehension than that of poachers and petty offenders? It never seems to strike Mr. Hill, that the great premium acts beneficially as a counterpoise to the bribe of the offender, so often tendered, and we are afraid not unfrequently accepted.

2. A free use of paper-money is another of Mr. Hill's nostrums. He holds that—

“Some of the most objectionable taxes, in their tendency to create crime, are those which afford temptations to steal money. As regards cheques, indeed, provided they are to be paid through a bank, a security has of late years been devised; but no such safeguard has yet been extended to bank-notes, though this might readily be done if there were no stamp-duty to prevent ordinary bank-notes being made payable, like bank post-bills, a certain number of days after sight.

“If this change were made, and if the law allowed the same free use of paper money in the rest of the kingdom as it does in Scotland, there would seldom be much temptation, so far as money is concerned, to turn highwayman, footpad, or burglar; for the money, when obtained, would in the main be of no value, as its payment could instantly be stopped.”

In the first place, payment of bank-notes can be stopped now. But does Mr. Hill seriously mean to suggest a return to paper currency in order to put this homœopathic check on highway-men? If so, "puerile" is too mild a term for such a chimera. We beg to assure him that the stamp does not prevent bank-notes being payable certain days after sight.

3. Mr. Hill proposes an alteration in the law of partnership, so that employers may take their labourers into partnership with limited liabilities, in order to prevent their resorting to trades unions!

4. Mr. Hill suggests further, that in order to prevent wives and husbands killing each other, urged thereto by the infeasibility of the marriage bond, the property of the wife shall be at her own disposal, and divorces be facilitated. This may be a reasonable measure on other grounds than as a prevention of crime.

There are other parts of this book, however, which, together with the works of Mr. Burt and Miss Carpenter, render it well worthy of the attentive consideration of all law reformers.

We trust that the committee now sitting on the subject of juvenile offenders will have some practical result. They are taking most valuable evidence diligently and intelligently.

ART. II.—STEPHEN'S COMMENTARIES.

New Commentaries on the Laws of England (partly founded on Blackstone). By Henry John Stephen, Serjeant-at-Law. Third Edition. Prepared for the Press by James Stephen, Barrister-at-Law, and Professor of Law at King's College, in the University of London.—London: Butterworths. Hodges and Smith, Dublin. 1853.

WE have long regarded this as the most valuable law book extant. We make no exception. We believe, moreover, the labour saved to the student by this work to be invaluable. Nor are we sure that any amount of labour could give him the

same comprehensive insight to the science he is about to enter upon. It is the grammar of law. It is sheer nonsense to talk of the worth of Blackstone now-a-days. We undertake to say, that the student who should read him now would have to unread half the work contains, and add as much more to his information when he had exhausted all that Blackstone knew. This results not merely from the changes which have since then taken place, but from the diffuse and often verbose style in which Blackstone wrote his very faulty work, which it has been the fashion of a comparatively illiterate age to laud and extol. We venture to suggest to Serjeant Stephen to discard Blackstone altogether, and to re-write the passages he has modestly, but injudiciously, interpolated, in his own infinitely superior composition. We need not remind him of a divine maxim, as to the piecing of an old garment with new patches; and we believe the patching of the new with the old a resource, if possible, still sillier. Every one laments the disfigurement of the book, resulting from the unsightly right-angled parenthesis marks, which botch nearly every page of Mr. Roworth's neat typography. Moreover, parenthesis marks have another signification appropriated to them, and do not mean "copied from Blackstone," or ever have the effect of quotation marks. They should not, we think, be wrested from their proper signification. But we readily admit that these are quite minor objections. The chief objection is, that what Blackstone wrote is infinitely inferior to what Serjeant Stephen could write; and yet he treasures up the smallest bits of Blackstone, as if they were precious stones to be set in metal of inferior value; or as the choicest gems in mosaic. Here is an example; the bit in brackets is from Blackstone:—

"A surrender [is done by these words, 'hath surrendered, granted, and yielded up,'] or the like."

Why Serjeant Stephen could not have expressed what is stated within these brackets without the formality of quoting them from his prototype, we cannot guess. Was he tempted by the beauty of the term "done?" Its accuracy could hardly have charmed him; for most unquestionably the surrender is *not* "done" by the words cited, though those words declare it, and

give it effect. It is really carrying one's idolatry a little too far to patch in Blackstone's blunders and crudities.

Here is another :—

"The next disability (for marriage) is want of age. This is sufficient to avoid all other contracts, on account of the imbecility [of judgment in the parties contracting; *à fortiori*, therefore, it ought to avoid this, the most important contract of any.] The age for consent to matrimony is fourteen in males, and twelve in females."

The interpolation is unfortunate, and the "*à fortiori*" remark inconsistent with the context; for if it be *à fortiori* needful that the contracting parties to a marriage be of mature age, how comes it that, while a young man is not old enough to contract for a box of segars at twenty, he may nevertheless contract for a wife at fourteen?

The *à fortiori* argument establishes the exact reverse. The canon law shows that the maturity of the judgment is really less concerned than the ability *ad matrimonium*; and the whole argument on the civil law is a mistake which had been better veiled. Blackstone's blunder, at any rate, need not have been introduced to blur the passage.

Let us now give specimens of the style which Serjeant Stephen so sedulously cherishes, that he hoards fusty fragments like these :—

"And here it is to be observed, that the [land so escheating afterwards follows the seignory, as being a fruit thereof. Therefore, if the lord was entitled to the seignory by purchase, the land escheated will descend to his heirs general; if by descent, they (*sic*) will be inheritable only by such of his heirs as are capable of inheriting the other."

To persons who already know the law of escheat this is intelligible, simply because they understand it already; but we think we may defy any novice in law to construe such a crabbed, ill-expressed sentence. Why on earth Serjeant Stephen did not write this in his own clear style, we are indeed at a loss to conceive.

It is refreshing to turn to his own composition after so nauseous a dose—homœopathic though it be—of grim old Blackstone. The Serjeant is treating of estates in reversion

(book i. p. 807), and has happily discarded every chip of the old block :—

“From what has been premised, it appears that a reversion and a remainder are both estates in expectancy, but differ in this respect, that the former remains in the grantor, by act or construction of laws as part of his former estate, but a remainder is an estate newly created by the act of the grantor. And here it is very material to remark, that it is *only* by way of remainder, that at common law (that is, independently of certain conveyances, founded on a statute to be hereafter mentioned), a man can create a new freehold estate in expectancy, in a corporeal hereditament. For it is an ancient rule, which lies at the root of the learning relative to remainders, that a freehold in hereditaments corporeal cannot be created to commence *in futuro*, that is, to take effect in possession at a distant period of time, without the interposition of a particular estate on which it shall be expectant. Thus if A., seised in fee of lands, convey them to B., to hold to him and his heirs for ever, after the end of three years next ensuing, this is, at common law, a void conveyance. This is because no freehold can in general be created at common law, in a corporeal hereditament, without livery of seisin; a ceremony in its nature incompatible with a grant of the freehold *in futuro*, inasmuch as it imports a delivery of possession, and consequently supposes that a right to the immediate possession, and not merely a future estate, is conveyed by the feoffee. And as it is the necessity for livery of seisin which constitutes the reason of the rule, so the rule itself extends not to mere chattel interests; which being created as we have seen, without that ceremony, are also capable of commencing *in futuro*. Thus though the fee cannot be created at common law to hold as from next Michaelmas, yet a lease for seven years from next Michaelmas will be good.”

Every one who runs may read this clear, forcible, vigorous style. This is extracted from the first volume, which, as every one knows, treats of personal rights.

The second volume, relating to the rights of property, is most ably written; we think, on the whole, the most so of any. The division of the matter is admirable.

We may cite an instance here of the great care taken by Mr. James Stephen, to whom much credit is due for the intelligent zeal and diligence he has evinced in preparing this edition for the press. In treating of the law of domestic servants, the 15 & 16 Vict. c. 11, is duly introduced, and such part as bears on the subject tersely but sufficiently stated.

In discussing the laws regulating election petitions, the 11 & 12 Vict. c. 98, is also fully introduced; and as this subject affords

a fair example of the learned author's aptitude for clear condensation of law, we give the following extract from this part of the volume :—

"1. No person is competent to vote unless his name appears on the register of electors; but, on the other hand, the law does not permit the qualification of any person, who has been so registered, to be questioned at the time of polling; nor is any inquiry whatever allowed to be made at the time of polling, relative to the right of any person to vote, except only as follows,—that the returning officer or his deputy shall (if required on behalf of any candidate to do so) put to the voter at the time of tendering his vote, and not afterwards, two questions, worded in such manner as the Act of Parliament in that behalf prescribes (or either of those questions), the object of which is to ascertain, 1st, the identity of the voter with the person registered, and in respect of whose qualification he proposes to vote; 2nd, that he has not already voted at that election. He may also (upon the like requisition) be put to his oath upon these matters. But the law provides, that no person claiming to vote shall be excluded from doing so, unless it appears upon his answers to the questions that he is not entitled to vote, or unless he refuses to take such oath, or the oath against bribery. For,

"2. A voter is also liable (if required by any candidate or by any two electors) to take the oath last mentioned; but the oaths of allegiance and supremacy, and some other oaths formerly required on these occasions, are now dispensed with.

"3. Though no person can vote unless his name be on the register, yet a person who has been excluded from the register by the 'revising barrister's' decision, may nevertheless tender his vote at the election, and the returning officer is bound to enter it in the poll-book as having been tendered, distinguishing, however, all votes so tendered from votes admitted. And in the event of a petition to the House of Commons, complaining of an undue election or return, the correctness of the register, either as to votes excluded or admitted, may be impeached before the committee appointed for the trial of the petition, and the vote allowed or rejected, as the case may be, and the poll altered accordingly."

The third volume treats of Public Rights and Civil Injuries.

We cite the following description of the laws regulating benefit and provident societies;—a very useful section of the new part of the work, in which the learned Serjeant, happily, could not enlist Blackstone; so that these passages are nowise disfigured, but are purely his own. Mark the simplicity and purity of the style.

"5. *Benefit Building Societies.*—The sanction and assistance of the legislature have also been granted to societies established to

raise a subscription fund, by advances from which the members shall be enabled to build or purchase dwelling-houses, or to purchase land, such advances being secured to the society by mortgage of the premises so built or purchased. By an Act of the 6 & 7 Wm. 4, c. 32, societies of this description, upon the certificate and deposit of their rules, as required by the Acts relative to friendly societies, are enabled to transfer shares without payment of stamp duty, and to effect reconveyances of the mortgaged property by a mere receipt for the money advanced, without incurring the expense of a formal instrument. They are also made subject in general to the various provisions of the law relating to friendly societies.

"Industrial and Provident Societies."—Lastly, it has been deemed expedient to extend the provisions of the Act relating to friendly societies to such associations of working men as have been formed for the mutual relief, maintenance, education, and endowment of the members, their husbands, wives, children, or kindred, and for procuring to them food, lodging, clothing, and other necessities, by exercising or carrying on in common their respective trades or handicrafts; and in favour of such associations, under the name of 'industrial and provident societies,' it has been provided, by 15 & 16 Vict. c. 31, that all the provisions relating to friendly societies shall, in general, and subject to certain exceptions, be applicable to them. But it is enacted that no society shall be entitled to the benefit of that Act, of which the rules shall not provide that the interest of any one member shall not exceed 100*l.*, exclusive of any annuity, and in the case of annuity, shall not equal 30*l.* per annum; and that nothing in the Act shall be construed to restrict the liability of any member to the lawful debts and engagements of the society, subject, however, to a proviso, that such liability shall cease at the expiration of two years from his ceasing to be a member of the society.

"In conclusion, we may observe, that while these benefits are conferred upon the different species of institutions above enumerated, upon condition that their rules are duly certified, one of them is partially extended even to institutions whose object is different, and which do not comply with that condition. For by 9 Geo. 4, c. 92, s. 27, any charitable or provident institution, or endowment whatever, if 'for the benefit of the poor,' may be allowed to deposit its funds in the savings' bank, at a rate not exceeding 100*l.* per annum, to the aggregate amount of 300*l.*"

The description of the prisons is also admirably given, and this again affords evidence that no statutes, however recent, are omitted, but are all noticed in their proper places. Luckily again, for posterity, on this subject also Blackstone was dumb; and Stephen alone speaketh:—

"The Queen's Prison; which is appropriated to the debtors and criminals confined under process, or by authority of the superior courts at Westminster, and the High Court of Admiralty, and also

to persons imprisoned under the Bankrupt law. There existed till, of late, three separate gaols for the reception of such prisoners, viz., the Queen's Bench, the Fleet, and the Marshalsea prisons. But by 5 & 6 Vict. c. 22 (amended by 11 & 12 Vict. c. 7), these are now consolidated into one. Towards the maintenance of the prisoners herein contribution is made out of the county stock, or rates of the several counties and divisions in England and Wales; and as to management, it is subject to such regulations as in the Acts contained, and to such as shall be made from time to time by one of Her Majesty's principal Secretaries of State, and afterwards laid before Parliament.

"The Milbank Prison (formerly called the Penitentiary at Milbank), for the reception of convicts under sentence or order of transportation, to be there confined until the sentence or order shall be executed, or until the convict shall be entitled to his freedom, or be removed to some other place of confinement. The justices of the peace have no authority over this prison; but it is placed, by 13 & 14 Vict. c. 39, under a board of three persons, to be appointed by a principal Secretary of State, as directors of the prisons of Parkhurst, Pentonville, Milbank, and of the places for confinement of male offenders in England under sentence of transportation, and to be a body corporate, by the name of 'The Directors of Convict Prisons.' These directors are to make regulations for the government of the Milbank Prison, subject to the approbation of a principal Secretary of State, and to make yearly reports to such secretary, as to all matters relating to the prison or the convicts; which reports are to be afterwards laid before both Houses of Parliament. A principal Secretary of State is also to appoint for the prison a governor, a chaplain, a medical officer, a matron, and such other officers as may be deemed necessary.

"The Parkhurst Prison; established in the Isle of Wight, for the confinement and correction of young offenders, male or female, as well as those under sentence of imprisonment. The rules of this prison are to be made by one of the principal Secretaries of State, and afterwards laid before Parliament; and they may include the infliction of corporal punishment on all such offenders. By the same authority a governor, chaplain, surgeon, and matron, and all other necessary officers are to be appointed. This establishment is, moreover, placed, by 13 & 14 Vict. c. 39, under the superintendence of the 'Directors of Convict Prisons,' who, if they discover any abuses, are to report the same to a principal Secretary of State; and shall also make a half-yearly report as to its state and condition.

"The Pentonville Prison; established by 5 & 6 Vict. c. 29, and provided for the confinement of male convicts under sentence or order of transportation, until they shall be transported or entitled to their freedom, or removed to some other place of imprisonment. It is placed, by 13 & 14 Vict. c. 39, under the superintendence of the same authority as the prisons of Milbank and Parkhurst, viz., 'The Directors of Convict Prisons;' and power is conferred on them to

hold meetings and make rules, subject to the approbation of a principal Secretary of State; and with the like approbation to appoint officers, consisting of a governor, a chaplain, a medical officer, and such others as may be found necessary. And it is provided that the directors shall from time to time appoint one or more of themselves to visit the prison during the intervals between their meetings; and, if they think fit, may delegate power to such visitors to make orders in cases of pressing emergency. And further, that the directors shall annually make reports to the Secretary of State as to all matters relating to the prison, its discipline and management; which reports shall afterwards be laid before both Houses of Parliament."

We cite this to show how thoroughly popular, as well as scientific, is the treatment of the new part of the work.

The fourth volume finishes the subject of civil injuries, and completes that of crimes.

We sincerely wish that a liberal condensation of this part of the treatise were compiled for general circulation among the people; published at a low price, it would not only have a large sale, but do infinite good in extending a knowledge of the most useful part of the law among the populace.

The laws, for example, defining crimes as regards animals are little known. See how well they are stated here. Condensation is not needed:—

"An eighth offence, which properly ranks under this head (horse-racing), is that of wanton and furious driving; as to which, it is provided by 1 Geo. 4, c. 4, that if any person shall be maimed, or otherwise injured, by reason of the wanton and furious driving or racing, or by the wilful misconduct of any coachman, or other person having the charge of any stage-coach, or other public carriage, such wanton and ferocious driving or racing, or wilful misconduct of such coachman, shall be, and the same is thereby declared to be a misdemeanour, and punishable as such by fine and imprisonment, but subject to a proviso, that the enactment shall not extend to hackney coaches drawn by two horses only, and not plying for hire as stage-coaches. This Act, however, must be taken as declaratory only of the common law, in the cases to which it refers; for at common law it is a misdemeanour, and may even amount to manslaughter, or murder, for any person to drive or ride so wantonly and furiously as to endanger the passengers on the highway."

The new statutes 14 & 15 Vict. cc. 19, 100, on criminal indictments, are set forth in their proper place.

The following statement of the mode in which queen's evi-

dence is admissible is extremely well put, and shows how valuable this work is, even for practical men as well as students:—

“It has also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol, in cases where it has appeared probable that the evidence would otherwise be insufficient to obtain a conviction, to hold out a hope to some one of the accomplices, that if he will fairly disclose the whole truth as a witness on the trial, and bring the other offenders to justice, he shall himself escape punishment. Such an accomplice is usually said to be admitted to become *queen's evidence*; but his admission in that capacity requires the subsequent sanction of the judges of gaol delivery. Nor will any person in general be admitted as *queen's evidence* if it appear that he is charged with any other felony than that in question. The testimony of an accomplice is in all cases, indeed, regarded with just suspicion; and unless his statement is corroborated in some material part by unimpeachable evidence, the jury are usually advised by the judge to acquit the prisoner; and if the accomplice, after having confessed the crime, and being admitted as *queen's evidence*, fails in the condition on which he was so received, by refusing to give fair and full information, he is then himself liable to be tried for the offence, and may be convicted on his own confession.”

We must close this brief notice of this invaluable book with one more word on the expediency on all scores of omitting from the next edition any further reference to Blackstone than such as brief notes may supply. It would not occupy more than a few months, were Serjeant Stephen to re-write the fragments in his own clear style, which he has so unadvisedly borrowed from Blackstone. Whatever may be the opinion of men of antiquated predilections regarding that obsolete commentator, we can assure Serjeant Stephen, that there is no question that patches of Blackstone are no improvement to new commentaries. The Serjeant's book (for such substantially it is) is much deteriorated by the attempt to introduce them. It is not only clumsy in appearance, destructive of uniformity of style and coherency of thought, but even the Serjeant is compelled to announce, in his preface, “that fundamental alterations have been made in the manner of treating” some parts of the subject, even where these quotations have been nevertheless retained.

The objections to an edition entirely discarding Blackstone are stated in the preface; but as they consist only in unmerited eulogies and unsupported assertions of the “grace and spirit of Blackstone's diction,”—his “merit of the highest

order,"—his "affluence of learning," &c., &c.,—it suffices to remark that no one else thinks so. Nor is any one but the modest author of this work—so immeasurably superior to the old commentaries—of opinion that "he cannot reasonably hope to rival their excellence." He could not by any possibility descend to their pompous platitudes, their comparative poverty of thought, their obscure style, inflated verbosity, faulty phraseology, or unpardonable omissions; defects by which they are now indelibly characterized, however true it is that they did good service in times, happily past, of meagre jurisprudence and jejune intellect.

ART. III.—STARKIE ON EVIDENCE.

A Practical Treatise of the Law of Evidence. By Thomas Starkie, Esq., Q. C. Fourth Edition, by George Morley Dowdeswell and John George Malcolm, Esqrs., Barristers-at-Law. London: Stevens and Norton. Hodges and Smith, Dublin. 1853.

A BETTER book was seldom added to the literature of jurisprudence than Mr. Starkie's "Treatise on Evidence." It is written in that plain, vigorous style which attracts whilst it informs, and enlivens as it enlightens the mind. With scarcely an exception, it is, in point of style, the ablest work we have. Nor is it less admirable in exposition of the mighty branch of law it grapples with, and professes to simplify and explain. It achieves this task with wonderful success and ability; and for a long period it ranked *facile princeps* among books on evidence. Many and many a good practical as well as theoretical legal mind has it nurtured and fashioned, for nowhere are the great principles of evidence more elaborately or intelligently set forth. It was for long a favourite standard book for the student, and a high authority with judge and counsel.

The editors and publishers have done good service by at

length giving the profession another edition, and rescuing one of our best law-books from the disuse and semi-oblivion which seems always to attend an old edition even of the most reputed works.

The editors have in their preface stated the work done by them to consist in perfecting the original, and making it available for the practitioner as well as the student. They have also divided it into chapters. They have—

“Introduced into it those heads from the second and third volumes which relate to Parol Evidence and Presumptions, and have relieved it of much matter which more properly belonged to the digest of proofs contained in those volumes. They have also added a copious index, still retaining the full analysis of the matter contained in the table of contents, and have thus, they trust, rendered this volume as complete a treatise in itself as the present state of the law will permit.”

The division into chapters is a great and manifest improvement. There were, however, two ways of doing the rest. From the period which has elapsed since the last edition, not only the *new cases*, but the really *new decisions*, have accumulated immensely. One mode of dealing with this obvious *necessitudo* was to re-write such parts as were materially altered thereby, or, at least, skilfully to interpolate the new law and illustrations with which the fecund intelligence of our modern judges has enriched this branch of jurisprudence. Another mode was to follow the old jog-trot fashion of reprinting all the original treatise with its modern defects and gaps in the text, tacking all the new decisions as a piecemeal commentary at the foot. There cannot be the slightest doubt that this is far the easiest plan, and saves a world of trouble. In fact, little more is required than the copy of a Digest to slash and cut away at, a paste-pot, and a tolerable knowledge of the subject, so as to refer to the notes in their proper places. The bulk of the book is, of course, also increased, which is very convenient. Whether this plan is equally profitable to the reader, we take leave to doubt. In the first place, it is obvious that in all cases where the new decision either modifies or overrules the old law, the reader has first to learn and then to unlearn,—he has first to read what is not right or not full, and then to read what is

right and full, in order to arrive at the present state of the law. Now, we do not concur in the policy of this proceeding. It is a chip of the old system of book-making to which we have so frequently, and not without manifest benefit, applied the lash. We owe it to the Profession to denounce any return to the old Mammon; and we are compelled to do it now. The high estimation in which we hold the ability and knowledge of the learned editors of this work, so far from disarming our criticism, aggravates the offence. Nor does the character of the work with which they have had to deal at all palliate the course they have taken in noting the almost unaltered text. There are very few works which are so thoroughly elementary, and at the same time written by such eminent writers, as to preclude the expediency of remodelling what they have written in future editions. Smith's "Lectures on Contracts" was one of these rare exceptions. The symmetry and beauty of that work as an essay were too perfect to justify the slightest change of the text; and though he was encumbered with new decisions, of which it was impossible to exclude notice in an edition for practical use, Mr. Symons, the editor, would have been guilty of great presumption had he changed a syllable of what Mr. Smith wrote. That was a case in which a running accompaniment of notes was inevitable. Blackstone's "Commentaries" afford a specimen of the converse. No clear-headed man need be deterred by fear of spoiling the style in which *they* are written; and so immense have been the changes on the subject, that it was obviously right in Serjeant Stephen to re-write the work. It is only to be lamented that he has retained so much of it. We admit that Starkie's "Evidence" affords a less striking example than Blackstone of the desirability of such recasting; but, still, the reasons for it strongly outweigh the objections. The style, though beautifully clear and forcible, need not have been spoiled by the requisite alterations; if made by so able a writer as Mr. Dowdeswell. Had all the really essential decisions been selected, the *gist* of them might have been easily interpolated with a little skill, so as not to injure the continuity of the treatise, and so as entirely to have obviated the necessity one is now placed under of constantly breaking off to read a curt note

having no kind of harmony with the text, and disrupting its perusal twice or thrice in a single page. This is a very great grievance, and materially detracts from the utility and agreeableness of the work. It is especially undesirable in this kind of book,—which is not, be it remembered, a mere text-book or book of reference, but a well-proportioned treatise on a congruous topic, which required and received at the hands of the author a continuous essay.

But having decided not so to treat the work, but to annotate it throughout, we are bound to say that this task has not been very efficiently or very fully performed. We apprehend, either that the writers should have completely presented all the new decisions, or that they should merely have given some of the leading cases which materially affected the text. The editors have done too much or too little; they have far exceeded the latter plan of selection; and have fallen so far short of the former, that we find the following recent cases, many of them familiar to our readers, and most of them more or less relevant to, and illustrative of, the subject in hand, wholly unnoticed:—

Reg. v. Anderson, 9 Q. B. 663; *Doe d. Earl of Egremont v. Langdon*, 18 Law J. Q. B. 17; 13 Jur. 96; *Doe d. Marriott v. Marquis of Hertford*, 13 Jur. Q. B. 632; *Page v. Robinson*, 3 Exch. 142; 18 Law J. Exch. 31; *Doe d. Vingoe v. Nicholls*, 13 Jur. Q. B. 123; *Doe d. Sayer v. Hatton*, 13 Jur. Q. B. 494; *Daines v. Hartley*, 3 Exch. 200; *Joll v. Lord Curzon*, 5 C. B. 205; *Ley v. Barlow*, 5 D. & L. 375; 1 Exch. 800; *Sotilichos v. Kemp*, 3 Exch. 105; 18 Law J. Exch. 86; *Cockburn v. Alexander*, 13 Jur. 18; 17 Law J. C. B. 74; *Hitchins v. Groom*, 5 C. B. 515; *Fishmongers' Company v. Robertson*, 18 Law J. C. B. 55; *Darch v. Toser*, 13 Jur. 959; *Re Heyes*, 3 J. & L. 568; *Neile v. Jakle*, 2 C. & K. 709; *Gaskill v. Skene*, 14 Jur. 597; 19 Law J. Q. B. 275; *Mercy v. Galot*, 6 D. & L. 656; *Reg. v. Basingstoke*, 4 N. S. C. Q. B. 80; *Doe v. Marquis of Hertford*, 19 Law J. Q. B. 526; *Armstrong v. Normandy*, 14 Jur. 579; 19 Law J. Exch. 843; *Gauntlett v. Whitworth*, 2 C. & K. 720; *Hargrave v. Hargrave*, 2 C. & K. 701; *The Lochlibo*, 14 Jur. 792; *Neilan v. Hannay*, 2 C. & K. 710; *Dye v. Bennett*, 1 P. Rep. 92; *Pritchett v. Smart*, 18 Law J. C. B. 211; 7 C. B. 625; *Matheson v. Ross*, 2 H. L. Ca. 286; 13 Jur. 807; *Spartali v. Benecke*, 19 Law J. C. B. 293; *Duke of Beaufort v. Mayor of Swansea*, 3 Exch. 413; *Murieta v. Wolfhagen*, 2 C. & K. 744; *Brooks v. Tichbourn*, 14 Jur. 1122; *Doe d. Earl of Shrewsbury v. Keeling*, 11 Q. B. 884; *Doe d. Hemming v. Willetts*, 7 C. B. 709; *Barton v. Hutchinson*, 2 C. & K. 712; *Ellis v. Cowne*, 2 C. & K. 719; *Lord Courtenay v. Phillimore*,

2 C. & K. 1018; *Reynolds v. Staines*, 2 C. & K. 745; *Doe d. Strickland v. Strickland*, 19 Law J. C. B. 89; *Bain v. Whitehaven & Furness Junction Railway Company*, 3 H. L. Ca. 1; *Harvey v. Towers*, 15 Jur. 544; 20 Law J. Exch. 318; *Monro v. Taylor*, 8 Hare, 56; *Turner v. Collins*, 15 Jur. 177; 20 Law J. Q. B. 259; *Reg. v. H. Maurice*, 15 Jur. 559; 20 Law J. M. C. 221; *Reg. v. Whittles*, 13 Q. B. 248; 13 Jur. 403; *Stebbing v. Spicer*, 8 C. B. 827; *Hughes v. Clark*, 15 Jur. 430; *Doe d. France v. Andrews*, 15 Q. B. 756; *Ashpittel v. Sercombe*, 5 Exch. 147; 6 Rail. Ca. 224; *Rennie v. Clark*, 5 Exch. 292; *Doe d. Wingrove v. Nichol*, 13 Q. B. 126; *Harding v. Hodgkinson*, 20 Law J. Exch. 236; *Black v. Jones*, 6 Exch. 213; 20 Law J. Exch. 152; *The Midlothian*, 15 Jur. 806; *Pell v. Daubney*, 5 Exch. 955; 20 Law J. Exch. 44; *Thompson v. Nye*, 15 Jur. 285; 20 Law J. Q. B. 85; *Boosey v. Davidson*, 13 Q. B. 257; *Bolin v. Melledew*, 20 Law J. C. B. 172; *Rayner v. Alnersen*, 15 Jur. 1060; *Alsworthy v. Norman*, 15 Jur. 1061; *Besant v. Cross*, 2 P. R.; 15 Jur. 828; 20 Law J. C. B. 173; *Rankin v. Hamilton*, 15 Q. B. 187; *Dews v. Biley*, 15 Jur. 1159; 20 Law J. C. B. 264; *North-Western Railway Company v. McMichael*, 20 Law J. Exch. 6; *Eaton v. Swansea Waterworks Company*, 15 Jur. 675; 20 Law J. Q. B. 482; *Doe d. Lord Ashburnham v. Michael*, 15 Jur. 677; 20 Law J. Q. B. 480; *Doe d. Padwick v. Wittcomb*, 15 Jur. 778; 20 Law J. Exch. 297.

None of these are so recent as to have been unattainable. In the chapter on contradicting Witnesses, running through several pages, we do not find a single case cited later than from Adolphus and Ellis, and Carrington and Payne.

At page 563, the following bad law is allowed to stand, on the subject of notice to produce:—

“Proof that the adversary, or his attorney, has the deed or other instrument in Court [was formerly held] not to supersede the necessity of notice; for the object of the notice [it was said] was not merely to enable the party to bring the instrument, but also to provide such evidence as the exigency of the case might require to support or impeach the instrument.”

Though the editors go on to refer to the recent case of *Dwyer v. Collins*, they wholly omit to inform their readers that Mr. Baron Parke therein *toto cælo* denounced the validity of any such principle, and cited this very passage (minus the words in brackets) in order to repudiate it. Why, then, is it retained? It is obviously bad law to require the one party to disclose his evidence, and enable the other to mature his reply. And the Court of Exchequer held, that it was sufficient to give notice to produce even at the trial, if the instrument was there; and, at all events, only just in reasonable time to bring it there.

The admirable style of the author—a perfect model for text books—and the antiquity and paucity of the notes, will be fairly and fully illustrated by the following extract from that part of the work which treats of the vexed point of degrading questions; an interesting subject, on which there have been many decisions, not always consistent. We give both text and notes *in extenso* :—

“The protection has been carried much further. It has been held, that a witness is not bound to answer any question which renders him infamous, or even to disgrace him, and that such evidence was inadmissible. In *Cooke's case*,¹ Treby, C. J., said, ‘*If it be an infamous thing, that is enough to preserve a man from being bound to answer;*’ and he therefore held, that persons convicted and pardoned, or convicted and punished for crimes, could not be obliged to answer, since it was a matter of reproach; and that it should not be put upon a man to answer a question, wherein he would be forced to forswear or disgrace himself.² It is, however to be observed, that the case of the *King v. Edwards*,³ is inconsistent with the above *dictum*; since it was there held, that a person proposed as bail was bound to answer the question whether he had stood in the pillory for perjury.

“The question, whether a witness must answer questions which tend to disgrace him,⁴ is, like many other questions on the subject of evidence, one of policy and convenience. On the one hand, it is highly desirable that the jury should thoroughly understand the character of the persons on whose credit they are to decide upon the property and lives of others; and neither life nor property ought to be placed in competition with a doubtful and contingent injury to the feelings of individual witnesses. On the other hand, it may be said, that it is hard that a witness should be obliged, upon oath, to accuse himself of a crime, or even to disgrace himself in the eyes of the public; that it is a harsh alternative to compel a man to destroy his own character, or to commit perjury; that it is impolitic to expose a witness to so great a temptation; and that it must operate as a great discouragement to witnesses, to oblige them to give an account of the most secret transactions of their lives before a public tribunal. That a collateral fact, tending merely to disgrace the witness, is not one which is properly relevant to the issue, since it could not be proved by any other witness: and that there would be, perhaps, some

¹ 13 How. St. Tr. 311; 1 Salk. 153.

² The question in that case was, whether a juryman, who had been challenged, could be asked, whether he had not before the trial asserted the guilt of the prisoner.

³ 4 T. R. 440. See *Bex v. Lewis and others*, 4 Esp. C. 225, where it is said to have been ruled, that a witness could not be asked whether he had been in the House of Correction; and *Macbride v. Macbride*, 4 Esp. 242, where it was held, that a witness could not be asked questions which tended directly to disgrace him.

⁴ See tit. “Rape,” “Seduction.”

inconsistency in protecting a witness against any question, the answer to which would subject him to a pecuniary penalty, and yet to leave his character exposed.

"In the first place, it is quite settled, that a man is not bound to criminate himself, or to answer any question by which he might incur a penalty. It may be observed, further, that the principle extends not only to questions where the answer would immediately criminate the witness, but to all questions which tend collaterally to his conviction, or to supply any link in proof of a charge against him. As to questions which tend *merely* to disgrace the witness there is some difficulty.

"In Cooke's case, the prisoner, on an indictment for high treason, asked the jurors, in order to challenge them, whether they had not said that he was guilty, and would be hanged? and the question was overruled; and the Court said, 'You shall not ask a witness or juror whether he hath been whipped for larceny, or convicted of felony, or whether he was ever committed to Bridewell for a pilferer, or to Newgate for clipping and coining; or whether he is a villain or outlawed; because that would make a man discover that of himself which tends to shame, crime, infamy, or misdemeanour.' In this case, it is to be recollected, that the object was to exclude the juror entirely, by raising an objection to his competency.

"The same observation applies also to Laver's case,¹ where the Court overruled the attempt of the prisoner to ask a witness on the *voir dire*, whether he had been promised a pardon, or some reward, for swearing against the prisoner; and in that case, Pratt, C. J., said, 'If the objection goes to his credit, must he not be sworn, and his credit left to the jury?' No person is to discredit himself, but is always taken to be innocent till it appear otherwise. The question, whether a witness was bound to answer a question upon a collateral fact tending to disgrace him, did not arise in any of the foregoing cases;² and, therefore, the *dicta* thrown out by the Court were, in some measure, extra-judicial, as far as regards the present question. In the case of *R. v. Lewis*,³ which was an indictment for an assault, a witness, who is stated in the report of the case to have been a common informer, and a man of suspicious character, was asked, upon cross-examination, if he had been in the house of correction in Sussex? And Lord Ellenborough is stated to have

¹ 16 How. St. Tr. 101. The Chief Justice Pratt did not deny that the question might be put after the witness had been sworn. The cases of a witness and juror differ very materially. With respect to jurors, no question is properly allowable, except for the purpose of showing total incompetency.

² There are many instances in which a man may be a witness who cannot be a juror: 2 Hale, 278; 11 H. 4. One attainted and pardoned cannot be a juror (per Holt, C. J., Rookwood's case, 4 St. Tr. 642); but he may be a witness. The reason is, that a juror cannot be examined and sifted, as to the grounds of his verdict, as a witness may be as to his testimony. The ancient rule of law was otherwise.

³ 4 Esp. C. 225.

interposed, and to have said, that the question should not be asked, since it had formerly been settled by the judges, among whom were Treby, C. J., and Powell, J., both very great lawyers, that a witness was not bound to answer any question, the object of which was to degrade or render him infamous. It is to be observed, however, that his lordship did not afterwards strictly adhere to this rule.¹ In the case of *Macbride v. Macbride*,² a witness for the plaintiff, in an action of *assumpsit*, was questioned as to her cohabiting with the plaintiff. Lord Alvanley interposed, and excluded the question; but his lordship added, 'I do not go so far as others may; I will not say that a witness shall not be asked to what may tend to disparage him: that would prevent an investigation into the character of the witness, which it may be of importance to ascertain. I think those questions only should not be asked which have a direct and immediate effect to disparage.' Upon the trial of *O'Coigly and O'Connor*,³ the witness having, upon a question being put which threw an imputation on him, appealed to the Court for protection in the first instance, the Court would not permit the question to be repeated. In the case of *Harris v. Tippet*,⁴ the witness was asked, in cross-examination, whether he had not attempted to dissuade a witness for the plaintiff from attending the trial: he swore that he had not; and on its being proposed to bring in evidence to contradict the witness on this point, Lawrence, J., would not allow it, the fact being collateral to the issue; but he added, 'I will permit questions to be put to a witness as to any improper conduct he may have been guilty of, for the purpose of trying his credit; but when those questions are irrelevant to the issue upon record, you cannot call other witnesses to contradict the answers he gives.' And in *Jewin's case*⁵ the same learned judge allowed the prisoner's counsel to ask a witness, in cross-examination, whether he had not been charged with robbing his master. Where a man's liberty, or even his life, depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony, should know, to the greatest extent, how far the witness is to be trusted; they cannot look into his breast, and see what passes there, but must form their opinion on collateral indications of his good faith and sincerity. Whatever, therefore, may materially assist them in their inquiry, is most essential to the investigation of truth; and it cannot but be material for the jury to understand the character of the witness whom they are called to believe; and to know whether, although he has not been actually

¹ At the sittings of Westminster, after Hil. Term, 1818, a witness was compelled by his Lordship to answer the question, whether he had not been confined in a particular gaol.

² 4 Esp. C. 242.

³ Upon the trial of *O'Coigly and O'Connor*, 24 How. St. Tr. 1353, the witness having, upon a question being put which threw an imputation on him, appealed to the Court for protection in the first instance, the Court would not permit the question to be repeated.

⁴ 2 Camp. 637, cited in *R. v. Watson*, 2 Stark. C. 116.

⁵ 2 Camp. 638, n.

convicted of any crime, he has not in some measure rendered himself less credible by his disgraceful conduct. In the case of the *King v. Edwards*,¹ on an application to bail the prisoner, who was charged with felony, one of the bail was asked, whether he had not stood in the pillory for perjury; and upon objection being made that it tended to criminate the party, the Court held that there was no impropriety in the question, since his answer could not subject him to any punishment."

The question whether a witness was compellable to answer a question which merely degraded him, was open when Starkie wrote his work. It is, however, since perfectly settled; and yet the editors let the old doubt go forth, and content themselves with citing a dictum of Best, C. J., ending their note with the vague and meaningless conclusion, "It seems to be essential to the ends of justice that the witness should be compelled to answer such questions as merely tend to degrade him." He is invariably compelled to do so; nor is there any doubt about it.

The chapters on Proofs are the best noted. That on Matters judicially noted is so copiously tail-pieced, that sometimes but one line is left for the text in a page (see 737). How infinitely better, then, to have re-written these chapters! Many of the notes put into the former editions are themselves rendered useless.

This is the fourth edition; and if there be a fifth on the same plan, we fully expect the bulk will consist of notes, and the text form an appendage.

It is full time that this system of vamping up old books should be discountenanced. If it be thought worth while, either by editors or publishers, that counsel of established reputation should grace the title-pages with their names, the public have a right to expect that their minds be thrown into the perfection of the work which the buyers are lured by such names to purchase at an enhanced price. This is not done if the book be merely noted, with some, or even with all the new cases.

We feel it incumbent on *us*, at any rate, to maintain our reputation of plain speaking in this matter, as in all matters which concern the interests of the profession, and the character of its literature: and we intend to be unsparingly vigilant in the denunciation of all similar short-comings.

¹ 4 T. R. 440.

ART. IV.—REGISTRATION OF ASSURANCES.

A Bill, as amended by the Select Committee, intituled "An Act for the Registration of Assurances in England," presented by the Lord Chancellor, and ordered by the House of Lords to be printed, 14th April, 1853.

The Registration of Deeds in England, its Past Progress and Present Position; with an Analysis of Lord Campbell's Bill for the Registration of Assurances. By William Hazlitt, Esq., Barrister-at-Law. London: 1851.

Shall we register or not? By Lord St. Leonards. London: 1853.

THE Bill for the Registration of Assurances, which was introduced in February last by the Lord Chancellor, has been carefully examined by a select committee of the Lords, and has been reported in the shape in which it will probably in substance become the law of the land. It is in most of its material provisions similar to the Bill of Lord Campbell, analyzed by Mr. Hazlett; but it is based on a registration without maps, and rejects altogether the sixty-fifth clause of that Bill, which enabled the Treasury to deposit for use in the Register Office the Tithe Commutation maps, the Ordnance maps, and other existing maps, or to cause any new maps to be made and published for the whole or part of any district. The patronage is transferred altogether from the Treasury, and vested in the Lord Chancellor, and the regulations are to be made with the concurrence of two Common-Law Judges in addition to the Lord Chancellor and the Master of the Rolls.

The Bill is not in words compulsory, but in effect it will become so ere many years roll over our heads. It meets the objection of parties to the deposit of the original deeds, or to the expense of having duplicates, by allowing authenticated copies to be deposited at the Register Office by those who wish to keep their own sheep-skins; and it meets another objection, of expense in small purchases, mortgages, and leases, by dispensing with fees for registration, and it introduces a right power

in the judges of regulating the fees of professional men in these small transactions.

The second reading of the Bill was strongly opposed by Lord St. Leonards, as being expensive and useless; he brought to bear, with much vigour, the arguments he had adduced in his pamphlet; but he did not divide the House.

We will give a careful abstract of the proposed enactments in the bill, as it has been amended in the select committee of the Lords.

The Bill starts with the provision, by the Lords of the Treasury from time to time, of a general registry office, in or near London or Westminster, and the appointment by the Lord Chancellor of the registrar, assistant-registrars, and clerks. The registrar to be a barrister who has practised as a conveyancer of ten years' standing, or who has been an assistant-registrar and conveyancer together for a like period; and the assistant-registrars are to be conveyancing and practising barristers of three years' standing, or one of the existing deputy-registrars, or a practising attorney or solicitor of five years' standing.

The registrar, with the concurrence of such persons as the queen, under her sign-manual, shall appoint, is forthwith to divide England into districts, for the purposes of the Act, of such extent as (having reference to local divisions, the state of ownership of land, and other circumstances) may in their opinion be convenient for facilitating searches in separate indexes to be kept for such districts respectively: and then the registrar, with the assent of the Lord Chancellor, is to give three months' notice in the *London Gazette* of the time when registration under the Act is to commence.

On the expiration of the notice (sec. 8), all assurances thereafter executed, "by which any lands in England may be affected at law or in equity, *may* be registered," by the deposit of the proper documents, and by proper entries to be made in the index: and in general the document to be deposited on such registration is to be the original assurance, or a duplicate thereof, or a copy duly authenticated at the Register Office,¹ The

¹ See post, p. 263.

documents to be made up into books or parcels, and numbered and arranged in such manner as the registrar may direct. All decrees or orders of any Court of Equity made after the commencement of registration, creating, declaring, transferring, foreclosing, or determining interests in land; and every order and decree varying or reversing the original order or decree are to be considered assurances; and the document to be deposited is to be the memorial of the decree or order, expressing the date, the title of the cause or matter, and setting forth the decree or order, or so much as relates to the estate or interest affected by the decree or order: the memorial to be examined and certified by some officer authorized to give out the decree or order; such certificate to be at the request of any person on a fee of two shillings and sixpence; but no decrees or orders becoming charges under 1 & 2 Vict. c. 110, are to be considered assurances affecting lands. Every future private Act of Parliament affecting lands is also to be deemed an assurance, and a copy printed by the queen's printers, or, if not printed, an examined copy, is to be deposited: and where by any Act of Parliament lands are vested on payment of any money, the person claiming under or by virtue of such vesting may register a memorandum containing a reference to the Act of Parliament, and a description of the lands, and the payment or other act vesting the lands; and with every such memorandum is to be deposited the original, or an authenticated copy of the receipt or acknowledgment of the person whose right or interest shall be bound or affected by the vesting of such lands, or other written evidence (if any) of such payment, or other act; the memorandum so registered to be considered as an assurance affecting lands: if such receipt, &c., be withheld, or cannot be conveniently deposited, a judge of one of the superior courts may, upon application of the person in whom the lands are vested, and upon proof by affidavit of such payment, or other act, order the registrar to receive and register the memorandum, accompanied by the judge's order.

There is to be an "*Index of Titles*" for all England, in which all registered assurances (except wills and such other assurances as are directed to be otherwise indexed) are to be indexed under heads to be designated by numbers, or otherwise,

as the registrar may think fit; every entry to express the year and the day of the month when the same is made, and the book or parcel in which the document is deposited, and the number of such document in such book or parcel, and any other particulars that may be required: and, in general, every assurance required to be indexed, where the grantor does not derive title either immediately or derivitively under an assurance already indexed, is to be indexed under a new head; or where the grantor derives title under an assurance already indexed under the same head as the former registered assurance.

There is also to be kept *for each district* in which the lands affected by the assurance are situated an alphabetical "*Index of the names of grantors*," with their additions, as set forth in the assurance, and an entry is to be made opposite to the grantor's name, containing a reference to the head under which the assurance appears in the "*Index of Titles*." Where the lands affected are situate in more than one district, like entries are to be made in the index for each district.

Any person interested under an equitable mortgage, to be made by a deposit of deeds, may register a memorandum containing a description of the lands, the names of the persons depositing the deeds, and the principal sum secured, or stating that the total amount does not exceed a certain sum, or that it is unlimited; such memorandum, for the purposes of this Act, to be considered an assurance affecting such lands: so, likewise, a person acquiring a lien by reason of the non-payment of purchase-money, may register a memorandum containing such particulars of the conveyance by the vendor as are sufficient to identify the same; and also containing a description of the lands, and the amount for which a lien is claimed.

Any will affecting lands, where the testator dies after the commencement of registration under this Act, may be registered by a deposit of the original will, or a duplicate, or a copy authenticated, at the Register Office: or, if probate, or letters of administration have been granted, and the will deposited in any court granting probate in England, the will may be registered by a memorial mentioning the name of the testator, with his addition as set forth in the will, and the court in which, and

the time when the will was proved, or the letters of administration were granted; or by the deposit of an office copy of the will, certified by the officer of the Court of Probate: or, if the will be not proved, or the letters of administration not granted in England, or where the original will is by any law required to be filed, deposited, or kept in any office or place out of England, the will may be registered by the deposit of an office copy, certified by any officer authorized to give out a copy from the place of deposit; or if there be no such officer, of a copy examined by some person or persons who shall sign his or their names on the copy, in testimony of such examination. The wills, &c., to be made up into books or parcels separately from other registered documents. Where any person having power to affect lands by will dies intestate, an office extract of the letters of administration may be registered, and any person who claims as heir, or any estate or interest which might have been affected or defeated by will of any person, and believes such person to have died intestate, or intestate as to such lands, may make and register an affidavit of intestacy, stating that he claims such estate or interest, the time of the death, and that he believes the deceased died without a will, or without any other will than mentioned in the affidavit: such office extracts and affidavits to be made up in books or parcels, and numbered in like manner as registered wills. There is to be made an alphabetical index for the *whole of England* as "*The Index to Testators and Intestates*," to contain the name of the testator or intestate, with his addition as set forth in the will, &c.: opposite to the name is to be the year and day when the entry was made, the nature of the document deposited, the book or parcel in which the will, &c., is made up, and the number thereof, in such book or parcel: and no will, letters of administration, or affidavit, is to be deemed duly registered until such entries are duly made.

Parties desiring to register by authenticated copies are (sec. 19) to leave the original and copy, or the original, of which a copy will be made in the office; either copy to be examined with the original by an officer of the registry-office, to be impressed on each sheet with the seal of the office, and a written certificate at the head, or in the margin, or endorsed thereon, of such

examination: the seal is also to be impressed on each skin or sheet of the original document; and a written certificate is to be placed on it, containing a statement that the authenticated copy has been deposited, and the parties by whom, at the time of deposit, the original appeared to have been executed, and specifying the book or parcel, and the number therein, in which such copy is made up. The original is then to be returned to the party by whom it was left; and every document, so sealed and certified, is in all cases to be evidence that a true copy has been deposited, made up in the book or parcel, and numbered: but where any original document shall be by law required to be filed, deposited, or kept elsewhere, an office copy, certified by the officer authorized to give out the copy, or, if there be no such, an examined copy, signed by the person who has examined it, may be deposited.

If assurances are lost or destroyed, and no duplicate is known to exist, upon proof before any judge of the superior courts of such facts, by oral or other evidence, and the production and verification to his satisfaction of any copy or writing admissible as secondary evidence, or, in the absence of such copy or writing, upon such evidence, by affidavit, of the contents of the deed, as the judge may deem sufficient, he may order the copy, writing, or evidence to be deposited, together with his order, in the registry-office; the registration to be effectual only so far as the deposited evidence of the assurance extends, and substantially and in all material respects agrees with the assurance.

Any person having any interest, legal or equitable, in any lands under any assurance authorized by this Act to be registered which has not been registered, or the husband, guardian, committee, or any person acting as next friend of any person having such interest, and who is under any legal disability, may require any person in possession of the original document, or a duplicate, or a copy, where a copy may be registered, to have the same registered; and in case of refusal, a judge may make such order respecting the delivery or sending of the document and copy to the registry-office as to him in his discretion, under the circumstances of the case, shall appear proper: but this power to enforce registration is not to be available in case any

agreement or provision has been made for the non-registration of such assurance by the person so interested, or by any person from or through whom he derives interest under such assurance. The judge is to have full power over the costs of the application and registration, and an application may be made to the Court of which he is judge to rescind or vary his order, or, upon his refusal to make an order; the Court having full discretion as to costs; and where the order or rule for the delivery of any document to be registered is not complied with, the order or rule may be registered in lieu thereof.

Petitions for adjudication of bankruptcy in England, and for a commission of bankruptcy in Ireland, and every appointment or choice of assignees in England or Ireland, and acts and warrants of confiscation to the trustee on the sequestered estate of any bankrupt in Scotland, may be registered: by a memorandum in the case of petitions; by an office copy of the certificate of the appointment and choice of assignees; and by a copy of the act or warrant certified by one of the bill-chamber clerks, and authenticated by the seal of the Court of Session; any order or appointment of assignees in insolvency may also be registered by an office or authenticated copy or certificate. An index, to be called "*The Index of Bankrupts and Insolvents*," is to be made and kept for *the whole of England*, containing the names and additions of the bankrupts and insolvents, and the dates of the entry, and a reference to the memorandum copy or certificate.

The 31st and following sections are the most important. They enact, that every assurance authorized to be registered, other than a will, shall (so far as regards any lands in England to be affected thereby) be void as against any person claiming for valuable consideration under any subsequent assurance duly registered, unless the prior assurance have been registered in the manner directed by this Act before the registration of the subsequent assurance; estates or interests arising under any Act of Parliament for vesting lands upon payment of money, or upon any other act, and equitable mortgages by the deposit of deeds and liens for purchase-money are also to be void against persons claiming for a valuable consideration under any subsequent

assurance duly registered, unless such memorandum as this Act requires has been registered; and any assurance which would have the effect of merging any interest in land is not to have such effect against any person claiming for a valuable consideration under any subsequent assurance duly registered, unless before the registration of such subsequent assurance an entry of the assurance which has the effect of merging such interest, shall be made in the Index of Titles under the head under which an assurance of such interest ought to be made.

No assurance is to be deemed duly registered until all the entries required have been duly made; and where such entries have been duly made as to part only of the lands affected, the assurance is to be deemed duly registered as to such part, but not as to the residue.

An unregistered will is to be void against a purchaser for valuable consideration taking from persons entitled under a registered will, or in default of a will where letters of administration or affidavit of intestacy shall have been registered. Wills registered within two years after the testator's death are to be as valid as if registered immediately on his death; and in cases of concealment, suppression, or contesting a will, or other inevitable difficulty, where a person interested under the will shall be disabled from registering it within the two years, an affidavit of a will may be made and deposited within that period, stating the name and addition of the testator, the date of his death, and the existing impediment to the registration of the will, and then the time for registration may be extended till six months next after all the impediments have been removed; unless the registration of the affidavit shall in the meantime have been cancelled by the Court of Chancery, upon the application, by motion or petition, in a summary way, without bill filed, of any person claiming, as heir or otherwise, any estate or interest in lands which might have been defeated or affected by such will or alleged will, in case it should appear to the Court that the affidavit was made and registered without due cause, or that the cause had ceased, or otherwise that the registration of such affidavit should be cancelled.

Purchasers are also protected against bankruptcy and insol-

veny unless the appointment of assignees be registered ; and also, where there is no fraud, against any adjudication in, or act of, bankruptcy, and before advertisement, unless the petition shall have been filed of record, or presented before the commencement of registration under this Act, or have been duly registered under the Act before the registration of the assurance to the purchaser.

The priority given by the preceding provisions, as respects any person claiming any lands for a valuable consideration, without fraud, and under a registered assurance, is not to be taken away by any Court of Equity, merely in consequence of such person having been affected with notice ; and where priority is so given of any equitable estate or interest, it is to be enforced in equity, although such claimant has been affected with notice.

Purchasers for a valuable consideration are not to be affected by notice of uses or trusts not manifested by a registered assurance, nor by uses or trusts declared by reference to an unregistered assurance.

Persons, however, who are interested under uses or trusts affecting estates vested under a registered assurance, may enter an *inhibition* against alienation : and this inhibition is to be entered in the Index of Titles ; but it may be cancelled by the registrar, on the application of the person against whom it is entered, or of a person interested in the land, unless within fourteen days after notice from the registrar, the Court of Chancery shall, on application of any party interested, by motion or petition, in a summary way, without bill, restrain the registrar from so cancelling the inhibition. Persons claiming under assurances made while inhibition is on the register, are to be affected by uses and trusts not shown by a registered assurance.

Any person may require in writing a *caveat* against his own acts to be entered in respect of any lands to be mentioned in the requisition in favour of any person described therein ; the caveat to be in force for six months only, renewable, however, for three additional months ; and any person claiming for valuable consideration, under any assurance affecting the same

lands made by the person entering the caveat, to or with the concurrence of the person in whose favour the caveat was entered, &c., his heirs, &c., is to have the same preference, &c., as if his assurance was registered at the time the caveat was entered, but the caveat is not to be a protection against bankruptcy or insolvency.

The protection of this Act is to extend to persons who claim under purchasers. Protection by legal estate and tacking is not to be allowed. Certificates of registration may be delivered out, and may be deposited by way of equitable mortgage.

Registration under this Act is substituted for enrolment in Chancery, under 3 & 4 Wm. 4, c. 74, and 4 & 5 Wm. 4, c. 92, as regards lands in England. A seal is to be kept, and the impressions are to be taken judicial notice of.

Duplicate originals of any assurance, duly registered, may be compared at the office and certified, and then the duplicate, so certified, may be received as evidence that another part has been registered. Copies and extracts may also be obtained and certified, subject to the regulations to be made by the registrar (all whose regulations must be approved by the Lord Chancellor, the Master of the Rolls, and two Common Law Judges).

Duplicate originals of assurances, other than leases where either part is executed by the lessee, are to be exempted from stamp duty; as are also all memorials and copies to be registered, and all copies, extracts, and certificates of searches.

No document is to be moved out of the office except in obedience to legal process, or an order of the Court of Chancery, or one of the Superior Courts at Westminster, and wills, for the purpose of being proved. The indexes are never to be removed from the office: in them searches are to be allowed, inspections may be made, and requisitions may be made for searches, upon which certificates may be given; and attorneys, solicitors, and agents, are to be held to have fulfilled their duty by delivering a requisition for a search, and obtaining a certificate of the result; and shall not be responsible for any error or mistake in the result of such search, as stated in the certificate; and in all other cases, every attorney, solicitor, and agent, is to

stand indemnified in relying on the accuracy of any certificate to be made or given, in pursuance of the Act.

The Treasury is to fix the fees to be taken; but no fee is to be taken at the office for the registration of any assurance where the consideration on a sale, or the mortgage money secured, or the premium for a lease, does not exceed 200*l.*, or where the rent reserved by a lease, without premium, does not exceed 20*l.* per annum: and all the charges of attorneys, in like cases, may be regulated by orders to be, from time to time, made by the Lord Chancellor, the Master of the Rolls, and two of the Common Law Judges. The registrar, with the approval of these four judges, may, from time to time, make regulations for—

“Determining the cases in which assurances are to be indexed in the index of titles under new heads and existing heads respectively, and the heads under which assurances are to be indexed in such index, and in what cases of assurances indexed in the index of titles references shall be made under any head in such index to any other head in such index, and in what cases of assurances so indexed entries in respect thereof shall be made in the indexes of the names of grantors, or in the index to testators and intestates (as the case may require), and providing generally for the convenient classification and arrangement under heads in the index of titles of the assurances to be indexed therein, and the making of such references between any heads of such index in respect of assurances connected in title and of such entries in the indexes of the names of the grantors and the index to testators and intestates, and any other index kept in the register-office, as may in the opinion of the registrar tend to render searches easy and safe; the particulars to be entered in the indexes to be kept in the register-office where entries are required under this Act, and the form and manner of such entries; requiring statements to be made and brought to the register-office; for directing or regulating the entries to be made on registering or entering any assurance, caveat, or other matter under this Act, and for affording information for the making of such entries, and as to the form of such statements, and requiring that the same shall be signed by the persons respectively requiring the registration or entry, and shall contain the addresses of such persons respectively, and determining and directing whether and in what cases such statements shall be written in or endorsed on the documents to be deposited as aforesaid or written on separate papers; the correction of errors and supplying of omissions in entries made under this Act; the issue of certificates of registration in substitution for like certificates which may have been lost or destroyed; the making of copies of and extracts from deposited

documents, and the granting of certificates with reference thereto, and the restrictions and conditions under which such copies, extracts, or certificates shall be made and granted; the making of searches of and providing and issuing extracts from the indexes to be kept at the register-office, and granting negative or other certificates with reference thereto; the forms of requisition for such copies, extracts, or searches as aforesaid, and the giving of receipts for documents received at the register-office, the mode in which and the restrictions and conditions under which searches of the indexes kept at the said office, and inspection of documents deposited there, shall be permitted; and generally for regulating all other matters and things whatsoever connected with the regulation and management of the register-office and the execution of this Act not specially hereby provided for."

From the commencement of registration under this Act, the local Register Acts for Middlesex and Yorkshire are to be repealed, in respect of assurances thereafter made, the wills of testators thereafter dying, and judgments, &c., obtained; the Lord Chancellor, Master of the Rolls, and two Common Law Judges, may appoint a time, after the expiration of six months' notice in the *London Gazette*, for closing the local register-offices; and the Lords of the Treasury are, from time to time, to make provision for the custody, searches, and copies of the memorials, indexes, &c., of these local offices.

The Act is not to extend to lands being parcel of the land revenues of the Crown; nor to apply to, or affect, copyhold estates, nor rack-rent leases, &c., for not more than twenty-one years, where the possession goes along with the lease; inclosure awards are not to be affected;—nor assurances relating to shares in public companies, required by virtue of an Act of Parliament to be registered or entered in the books of the company; nor the Bedford Level; but none of these provisions are to affect the provision of this Act, to prevent protection by legal estates or tacking.

There are other provisions relating to the office of registrar, the persons before whom affidavits are to be sworn, and other matters which we need not here particularize.

The chief enactments are now before our readers, and from this abstract they will be able to form their own opinion of the probable efficacy of this measure. For our own parts we regret that the possibility of using the Tithe

or Ordnance Maps is abandoned: the expense which deterred the first promoters of a general registration from insisting on maps has been already incurred; and the objection that in a few years the ownership of estates will be so much changed, or that lands will be so often divided and sub-divided, as to render new maps necessary, does not apply to the largest area of the country; it is confined mainly to land to be used for building purposes, or for small holdings, and it is perfectly notorious, that there is not a nobleman or gentleman whose estate is brought into use for building, who does not easily, and at a small expense, have prepared a correct map, showing to an inch every sub-division on his estate.

The proposed Act very properly leaves all matters of detail to the regulations to be framed by the Registrar, and to be approved by the Lord Chancellor, the Master of the Rolls, and the two Common Law Judges; and with due care and consideration, a very accurate registry, under the proposed Indexes of Titles, &c., may, no doubt, be made; and although maps may be wanting, it will not be very difficult to construct a plan, which will be clear and accurate, and, at the same time, facile of reference and search.

W. D. COOPER.

ART. V.—LAW REFORM AND ITS PROSPECTS.

THE re-opening of the session under the new administration has been distinguished by the production of the reforms announced in November last by Lord St. Leonards, whose Bills for reform in matters of lunacy, for a consolidation of the criminal law, for the amendment of the bankruptcy law, and for the further relief of the suitors in the Court of Chancery, were read a first time on the 10th of February, but with two exceptions have made no further progress. On the 14th of February, Lord Cranworth made an exposition of his views on the portions of law reform, which he was inclined to take in

hand this year. His speech was conceived in a spirit deprecating any great changes, and he spoilt the effect of his announcement of what he intended to do, by a very long and tedious statement of the effects produced by recent changes, and of the impropriety of rashly altering the procedure in the courts, till the new system in Common Law and Chancery Courts has been fully tried. We do not doubt that the Lord Chancellor is as zealous as his predecessor, in the task all good lawyers now desire to take upon themselves; but when three-fourths, and those at the beginning of a speech, were taken up with statements of what it is not intended to be attempted or done, and when the remaining fourth contained only the announcement of one Bill—for the registration of assurances—the promise of a new commission for the consolidation or codification of the statute law,—and a very vague promise, that something should be done for the revision of charitable trusts, and the reform of the Ecclesiastical Courts, without a hint even of any plan,—when all this inversion, as it were, of the usual order of ministerial statements, met the public eye, the contrast between Lord St. Leonards and Lord Cranworth, was not drawn favourably for the latter: herein he did himself and his colleagues considerable injustice. This deficiency, however, has been met by the actual progress he has made with the Registration of Assurances Bill, which has come out of the select committee in an amended and workable form, and on which we comment in a separate article;—by the straightforward declaration in the Commons by the Solicitor-General, that the Ecclesiastical Courts, so far as their contentious jurisdiction goes, are to be abolished; that the Diocesan Courts are to be continued solely for giving facilities for the proof of uncontested wills under a limited amount; and that the Court of Chancery is to become a general court of probate;—and by the actual appointment of a commission of very competent men to digest the statute law.

On the several measures in progress, we now propose to make some comments, and to point out to the profession the particulars of the suggested changes.

In passing, however, we may observe, that though the Common Law Procedure Act continues to work well, even without the long-delayed rules of the judges, which will not come into force till the first day of Trinity Term; and though the Superior Courts are more freely resorted to by suitors, who can obtain judgment in undefended actions at a reasonably small expense, yet the time is not far distant, when it will be necessary to give additional powers to the judges, to frame fresh rules and regulations to render the Common Law Courts at Westminster Hall fully available for a large portion of business, which has been recently diverted into the County Courts, and which it is obviously desirable to have brought under the supervision of a competent Bar, and more than a single judge.

So, also, will it be found to be with the Equity Courts. We are waiting, and we fear are likely to wait, for the further report from the Chancery Commissioners, promised a year and a half ago; but when that report shall be made, Lord Cranworth will discover that he has made a mistake in supposing that any more "reform of the Court of Chancery is inexpedient," at present. He will find that the mode in which the chamber business goes on, or, perhaps, we ought to say, stands very nearly still whenever parties choose to be slow, or care not what delay they interpose, is anything but satisfactory; and, moreover, that a few months only will elapse ere the new mode of examination, which compels the whole of a long *vidæ voce* examination, and cross-examination, to be taken down and reported to the Court *in extenso*, will involve immense trouble, great delay, and fearful expense. In matters of small pecuniary value, that expense will be frightful. The average length of questions and answers given in a five hours' sitting before an election committee is 400, or 800 folios an hour: and when we find that six whole and consecutive days are appointed by one of the examiners for one side in a single cause, when we know also that the transcript of the examinations must be taken by each of the interested parties, and that two copies of the whole evidence must be given to counsel, it appears to us certain, that the expense will cause a justifiable ground for remonstrance;

and that amidst the mass of questions and answers, the counsel and the Court itself will, on the hearing, find great difficulty in winnowing the chaff from the grain.

Lord St. Leonards' Bill for the further relief of suitors, by amending the Accountant-General's mode of proceeding, is an additional proof that all additional reforms in Equity are not "inexpedient." This Bill will be altered in committee; and it may be said at once, that on some points the most practical men do not coincide with Lord St. Leonards in his proposed method of changing the system; but there cannot be any hesitation in averring that in principle he is correct, when he gives power to the Lord Chancellor to direct that, instead of an actual sale or purchase of stock, which already stands in the Accountant-General's name in one aggregate fund, the same may be considered as effected according to the stock-list of the Bank of England; that no brokerage shall be charged except where sales are actually made; that an account shall be kept of all moneys remaining uninvested for two years, and then that the amount shall be deemed to be invested in the Three per Cents.; that the funds on which no dividends shall have been received for fifteen years, may be transferred to the Suitors' Fee-fund, out of which may be afterwards satisfied the rights of the suitors to the stock or dividends so transferred; that a small sum of one guinea shall be paid in lieu of brokerage on the transfer of stock; that the stamp-duty on powers of attorney for the receipt of gross sums not exceeding 20*l.*, or of dividends not exceeding 5*l.* annually, shall be reduced to five shillings; and that the Lord Chancellor may empower the Accountant-General to act on powers of attorney once given, and not revoked in the receipt of future money: but we cannot agree in the proposal, that the salaries of the judges in Chancery may be paid out of any excess of the Fee-fund; instead of out of the consolidated fund. It is wrong in principle to charge the suitors of any court with the salaries of the judges; it is one of the defects of the County Courts Acts; it is, in effect, a partial denial of justice to intending suitors: and in our opinion, any excess of the Suitors' Fee-fund should be applied directly in the remission of fees payable by the suitors themselves. Equity

is, at the best, a very expensive luxury ; it is somewhat hard to add to that expense the salaries of judges, which ought to be, not only appointed by, but paid also by the state for the good of the entire community, and not of suitors alone.

The Ecclesiastical Courts are to be abolished ; thanks to the Solicitor-General ; who took occasion, on Mr. Hadfield's moving the second reading of his Bill (for limiting the places for granting probates of wills and letters of administration, and rendering a single probate in any competent court available for all parts of the United Kingdom), to declare the intentions of the Government.

The vagueness of the Lord Chancellor's statement on the head of ecclesiastical reform induced Mr. R. P. Collier, in a well-considered, temperate, and most effective speech, to bring the whole question before the House of Commons on the 1st of March ; and he received from the Solicitor-General so satisfactory a promise on the part of the Government, that no division was pressed. The promise was well kept ; and on the 6th of April Mr. Bethell announced to the House the changes he suggested. He was cordially supported by Mr. Walpole ; and Dr. Phillimore, the advocate for the prerogative men, who have always been about to introduce and carry a measure to reform themselves, but for twenty years at least have not favoured the public by completing their self-imposed task, was fairly astonished at the comprehensiveness of the Solicitor-General's plan, and at the cordial acquiescence of the Commons in its main features. He proposes to abolish the peculiars and the Metropolitan Court of York, and to establish one court of probate, to take effect throughout the whole of England and Wales, upon all subjects of contentious jurisdiction. The measure would so far include Ireland and Scotland, that probate granted in any one of the three countries would be of equal effect in the two others. As nearly nineteen-twentieths of the probates granted are for wills proved in the common form, by an affidavit of the due execution and attestation, he proposes, for the convenience of parties residing away from the metropolis, to keep the diocesan courts for the proof in common form of wills where

the estates do not exceed 1,100*l.* or 1,200*l.* in value; subject to the condition, that in every diocese the chancellor shall be a lawyer of certain standing, and have the requisite professional qualifications; and also subject to the condition, that every will proved in the diocesan courts shall be transmitted to the general registry of wills in London, official copies only being left for reference in the different diocesan courts.

He proposes also to extend to the County Courts the power of exercising a certain jurisdiction for the purpose of administering the debts and estates of intestates; and we presume also of testators to a limited amount.

He also proposes that the metropolitan court shall be transferred, with all its officers and staff of practitioners, registrars clerks of the seat and proctors, to the Court of Chancery; the only tribunal to which the administration of estates of deceased persons has been committed, and the only tribunal which has the authority to construe wills of personal estate, and also affecting real estate; and thus to make the Court of Chancery a court of probate, whereby the whole jurisdiction of the country with respect to the probate of wills and the administration of estates will henceforth be regulated and controlled by one tribunal, will flow through the same channel, and be guided by the same principle. The officers, proctors, &c., of the Prerogative Court of Canterbury are to be compensated by being at once made officers of the Court of Chancery, and by having exclusively for a certain time the conduct of the business regarding the probate of wills in the common form; and as to the officers of the County Courts, there are few who do not come within the provisions of the 6 & 7 Wm. 4, which provides, that in the event of the jurisdiction of Ecclesiastical Courts being abolished, no judge, registrar, or other officer, should claim or receive compensation.

By this arrangement, not only will the whole of the wills be preserved at one office, but as the metropolitan tribunal will have the power, not only of determining the validity of a will, but also of directing it to be carried into effect with respect to real as well as personal estate, and then all appeals will go to the House of Lords instead of being carried, as they now are, some to that

tribunal and some to the Privy Council, both courts having co-ordinate independent jurisdictions, and therefore liable to arrive at opposite conclusions. And, moreover, there will be the facility, pending litigation for administering the estate under the Court of Chancery, of collecting the debts, and disposing of the property, thus obviating the many causes of embarrassment and delay which arise under the present system.

The main difference between the proposal of Mr. Collier and the plan of the Solicitor-General is, that the former would abolish the whole of the diocesan courts, and would use the County Courts, not only for the supervision of the administration of the testators' or intestates' estates, but also for the proof of wills in common form; and he would transfer the power of deciding upon the validity of wills to the courts of common law, where oral evidence is taken, and the assistance of a jury can be obtained.

Possibly Mr. Bethell's proposed retention of the diocesan courts may be the means of conciliating support in the Upper House; but as a matter of convenience and utility, there cannot be a question that the County Courts are of far more value than the diocesan courts. The County Courts are not only far more numerous, but they are close upon the homes of the executors and parties interested in the administration of the deceased person's estate; whilst the diocesan courts are, in all the dioceses, far removed from the bulk of the resident inhabitants; and the city in each diocese is frequently situated at a place far more difficult of access to the persons in the diocese than is the metropolis. It may not be worth while to fight the question closely now; but it is evident to us, that the retention of the diocesan courts will be found in practice to be a mistake, and that resort will then be had to the County Courts, in addition to, or in substitution for, these older courts.

The question of the proper court for determining the validity of contested wills is more difficult of solution. We have already given our opinion, that the Court of Chancery is, upon the balance of advantages and disadvantages, preferable to the common law courts; but the mode of taking evidence must be amended; and it is important that the advantages of a jury

should not be altogether abandoned. The Law Amendment Society are not content with the equity or common law courts, even if the defects of either be amended. The Society have therefore resolved :—

“ 1. That the present jurisdiction of the Ecclesiastical Courts, so far as testamentary matters are concerned, is universally admitted to be unsatisfactory, and requires extensive reform.

“ 2. That this reform should consist of a transfer of their present jurisdiction in testamentary matters to a court clothed with jurisdiction as well over wills of real as of personal estate.

“ 3. That to create a new court for the purpose would be undesirable if any existing court can be found to which such enlarged jurisdiction may be properly intrusted, and to which complete powers can be given.

“ 4. That the existing courts of common law and County Courts, not having an equitable jurisdiction or power of dealing with trustees, or with equitable matters arising in the construction of wills, should not, as at present constituted, be intrusted with such enlarged jurisdiction.

“ 5. That the existing courts of equity, not having any power of empannelling a jury, or of conclusively deciding issues of fact, are under a similar disqualification.

“ 6. That in order to do complete justice in testamentary matters, it is necessary that the court to which they are intrusted should possess the full and conjoined powers of a court of law and of a court of equity.

“ 7. That no thorough or satisfactory settlement of the questions pending with respect to the testamentary jurisdiction of the Ecclesiastical Courts can be come to, except by its being exercised by a court of conjoined law and equity, having jurisdiction over wills of real and personal estate.

“ 8. That it is the bounden duty of the Government of this country to provide such a court for the proper adjudication of all testamentary matters, and of this society to promote its establishment by every means in its power.

“ 9. That the most desirable means of effecting this appears to be the union of the present law and equity commissions, and inviting their immediate attention to this important question.

“ 10. That the above resolutions be taken as the basis of the first report of this committee.”

The multiplication of courts will be a vast evil. There can be no separate and co-ordinate jurisdictions, as the Solicitor-General shows, without the collision of judgments, and the very step suggested in these resolutions would retard that fusion of law and equity in matters partaking largely of both, which it is desirable to further as far as is practicable. The

principles of each are in most cases so distinct, that very perfect fusion is out of the question; but in the case of wills, an improvement in the courts of equity, or additional powers to be given to the common law courts, would give all the facilities for sound and just decisions that can be hoped for.

Closely allied to the question of the amendment of the Ecclesiastical Courts, is an alteration of the Law of Divorce; and the commissioners appointed to consider that part of the law have made a report which contemplates the establishment of a new court, composed of a chancery judge, a common law judge, and an ecclesiastical judge: but if the Solicitor-General's reform of the Ecclesiastical Courts be carried, the latter judge, unless appointed for a court of probate, would be non-existent. These commissioners, having considered the Law of Divorce in its different bearings, thus sum up briefly the alterations and improvements which they think may be made in it with prudence and safety. These suggestions are:—

“ That the distinction between divorce *à mensà et thoro* and divorce *à vinculo matrimonii* shall still be maintained.

“ That the grounds for a divorce *à mensà et thoro* shall be conjugal infidelity and gross cruelty.

“ That wilful desertion shall either be also a ground for divorce *à mensà et thoro*, or else shall entitle the abandoned wife to obtain from her husband a proper maintenance by way of alimony.

“ That divorces *à mensà et thoro* may be obtained by the wife for the above-mentioned causes as well as by the husband.

“ That divorces *à vinculo* shall be allowed for adultery, and for adultery only.

“ That divorces *à vinculo* shall only be granted on the suit of the husband, and not (as a general rule) on the suit of the wife.

“ That the wife, however, may also apply for divorce *à vinculo* in cases of aggravated enormity, such as incest or bigamy.

“ That recrimination, connivance, and condonation shall, if proved, be deemed and treated as bars to the suit.

“ That recrimination shall include any of the grounds for which divorces may be obtained *à mensà et thoro*.

“ That the existing mode of obtaining a divorce *à vinculo* shall no longer be continued.

“ That a verdict at law, and an ecclesiastical sentence, shall not be considered as preliminary conditions which must be complied with before it can be obtained.

“ That a new tribunal shall be constituted to try all questions of divorce.

"That all matrimonial questions also, which are now determined in the Ecclesiastical Courts, shall be transferred to the same tribunal.

"That this tribunal shall consist of a vice-chancellor, a common law judge, and a judge of the Ecclesiastical Courts.

"That the party who seeks a divorce, whether it be a divorce *à mensà et thoro*, or a divorce *à vinculo matrimonii*, shall pledge his belief to the truth of the case, and that there is no collusion between himself and his wife.

"That the evidence shall be oral, and taken down in the presence of the parties.

"That in general the process, practice, and pleading shall conform to the process, practice, and pleading of the Court of Chancery, as recently improved; with such additions as may be beneficially derived from the ecclesiastical system.

"That the rules of evidence shall be the same as those which prevail in the temporal courts of the kingdom.

"That the judges shall have the power of examining the parties, and also of ordering any witnesses to be produced who in their opinion may throw light on the question.

"That the Court shall be intrusted with a large discretion in prescribing whether any and what provision shall be made to the wife, in adjusting the rights which she and her husband may respectively have in each other's property, and in providing for the guardianship and maintenance of the children.

"That there shall be only one appeal from the decree of the Court, and that the appeal shall be carried to the House of Lords."

This junction of common law and equity judges has not been found to work well in practice, when the great seal has been put into commission; and though the Privy Council is an example of a mixed court arriving at good conclusions, it is matter of notoriety that in fact the judgments there given are written by one of the judges who is supposed to be most conversant with the law applicable to the particular case to be determined, submitted to and acquiesced in by his colleagues; and, moreover, that what may work tolerably well in a court of appeal, may be a complete failure in a court of original jurisdiction. The model taken by the divorce commissioners is a court of appeal, and even in that court the questions are practically settled by one of the numerous judges. We can see no good, therefore, in a new and separate court for probates or divorce, which may not be obtained from existing tribunals.

Two of the three Bills introduced by Lord St. Leonards for

the amendment of the law relating to lunatics, have passed through committee, and are now in a working shape.

By the *Lunatics Care and Treatment Bill* it is provided that one license may include more than one house of the same proprietors, separated by land or buildings in the same occupation, and by a public or private road, or by either of such modes; and that one licensed proprietor, at least, shall reside on the licensed premises. Sections 45 to 49, both inclusive, of the Act 8 & 9 Vict. c. 100, are repealed, and it is to be enacted that no person (not a pauper) is to be received into a hospital or licensed house without an order signed by a relative or person connected with the patient, and a certificate signed by two persons, each of whom shall be a physician, surgeon, or apothecary, not in partnership with or an assistant to the other, and each of whom shall have separately and personally examined the alleged lunatic not more than seven clear days previously to the reception; but under special circumstances the person may be received on the certificate of one medical man, if the order state the special circumstances which prevent the examination by two medical men, and the one medical man certifies his opinion that it is expedient for the person to be confined without further delay; and then, within three clear days after the reception, a second certificate is to be obtained from two other medical men not signing the first certificate, and not connected with the house or hospital, or the person is to be restored to the party signing the order. Any person discharged may, with the assent of two commissioners, after personal examination, be retained in a licensed house as a boarder, and a relative or friend, for the benefit of the patient, may with the like assent be received therein.

No pauper is to be received without an order signed by a justice, or by an officiating clergyman, and the relieving officer, or one of the overseers; nor without the certificate of one medical man, who shall have personally examined the pauper not more than seven clear days before the reception. It is made a misdemeanour, subject to an indictment or to a penalty of 20*l.*, to be recovered summarily before two justices, for an officer, attendant, &c., to ill-treat a lunatic. Every medical

certificate is to specify the facts upon which the opinion of insanity, &c., is founded, distinguishing the facts observed by the medical man himself from facts communicated to him by others. Orders and medical certificates, which are incorrect or defective, may be amended by the person signing the same within fourteen days after the lunatic's reception; but no medical man who, or whose father, brother, son, partner, or assistant, is wholly or partly proprietor of or a regular professional attendant in a licensed house or hospital, is to sign the certificate or the order for admission; and any medical man giving false certificates, and any person, not being a medical man, giving certificates as such, is to be guilty of a misdemeanour.

The commissioners, by order under their seal, may permit the visitation of single patients less frequently than once in two weeks, and may particularise the time for any single patient to be visited; but if the patient be in the care of a medical man, he is to make an entry once a fortnight of the patient's health: visitors of licensed houses may visit single patients on the request of the commissioners. An annual report is to be made to them by every medical man visiting or having charge of a single patient, and the provisions concerning the discharge of patients from licensed houses by relatives are extended to single patients.

The Lord Chancellor, upon the report of the Commissioners in Lunacy, may discharge any single patient from an unlicensed house. On the recovery of a patient, notice is to be given to friends, or in the case of paupers, to the guardians, and in default of discharge or removal, to the commissioners and visitors. Persons having authority to discharge a patient may, with the assent of two commissioners, remove him to a licensed house or hospital: notice of the discharge of single patients is to be given by the person who has had the charge to the commissioners; and in case of a change of residence, the person having such charge is, within two clear days, to give notice thereof, and of his new residence, to the commissioners; and, with the assent of two commissioners, he may take or send such patient under proper control to any specified place, for any definite time, for the benefit of his health. On the representa-

tion of the commissioners, the Lord Chancellor may require a statement of the property of a lunatic who shall have been detained for a year; and notice of the dismissal, for misconduct, from a licensed house or hospital of any nurse or attendant is, within a week, to be sent to the commissioners under a penalty of 10*l*.

Section 89 of the former Act is repealed; and the powers of private committees are to be vested in the commissioners, or any two or one of them, as the case may require. Visits may be made by any two commissioners one receiving salary, and they may direct that one receiving salary may alone visit a licensed house having not more than twenty patients. It is also provided that any one or more of the commissioners may on such days and hours, and for such length of time as he shall think fit, visit workhouses to see that the law is carried into effect, and the dietary accommodation and treatment of the lunatics therein, and shall report in writing thereon to the Poor Law Board. The commissioners are also authorised, in any special case requiring immediate investigation, to appoint any competent person or persons to visit, examine, and report upon the mental and bodily state and condition of any lunatic or alleged lunatic in any asylum, hospital, or licensed house, or under charge as a single patient. The regulations of hospitals are to be submitted for approval to a Secretary of State, and the commissioners are authorised to make regulations for the government of licensed houses. The commissioners' annual reports to the Lord Chancellor of the state of asylums, &c., are to be made in or before the month of March (instead of June), and are to be made up to the end of the preceding year.

A penalty of 20*l*., in addition to any other punishment to which the party would be liable, is imposed on persons obstructing the execution of the orders of the Lord Chancellor, or the Secretary of State, or of the Commissioners, for visitation, examination, inspection, or inquiry.

The exemption in favour of Bethlehem Hospital is also repealed, and that is to be forthwith regulated as a hospital, under the former Act.

The proposed new Act is not to affect the provisions of the

law relating to criminal lunatics, and is to commence from 1st August, 1853.

The *Lunatic Asylums* Bill consolidates and amends the law for the regulation of county and borough asylums, and for the maintenance and care of pauper lunatics. The principal additional provisions, besides the re-enactment of the existing law, may be briefly set out. The Bill compels every county and borough not having a lunatic asylum to provide one; but small boroughs not having six justices besides the recorder, are to be joined to the county. The justices of boroughs may contract with committees of asylums for the reception of the pauper lunatics of the borough; and boroughs neglecting to provide an asylum, or contract for the pauper lunatics' maintenance, may be annexed by the Secretary of State to the county. The provisions of the Land Clauses Consolidation Act, 1845, are incorporated with this Act, and extended to exchanges; and visitors may take adjoining land compulsorily for the enlargement of asylums. Clerks of asylums are to be appointed, who are to transmit to the Commissioners of Lunacy information of the dismissal of attendants. Annual reports are to be made by Committees of Visitors to the justices at quarter sessions, and a copy sent to the Commissioners in Lunacy. Provision (taken from Lord Shaftesbury's Lunacy Bill of 1852) is made for lunatics wandering abroad, or not properly taken care off. Justices may order payment of a fee to the medical man called in to examine any person; and the provisions of the former law, as to the expenses of the maintenance of pauper lunatics, are extended to wandering lunatics.

The Act proceeds on the true principle of codification, by repealing the existing Acts of 8 & 9 Vict. c. 126; 9 & 10 Vict. c. 84; and 10 & 11 Vict. c. 43; and then re-enacting in consecutive order such parts of the former law as it is intended to retain, under the proper heads, such as "providing asylums and appointment of committees of managers;" "raising moneys for providing asylums;" "regulation and management of asylums and appointment of officers;" "visitation, reception, removal, and discharge of lunatics;" and "expenses of maintenance, removal, &c., of pauper lunatics." Thus, the whole law on the

subject is incorporated in one Act, and a reference to that alone is necessary to show what provisions are for the time being in force.

The *Lunacy Regulation Bill*, for the regulation of proceedings under commissions of lunacy, and the consolidation and amendment of the Acts respecting lunatics and their estates, has not yet passed through committee, and it would therefore be premature to give an abridgment of its proposed enactments. It will effect a great saving in the expense of separate commissions of lunacy, and in the management of lunatics' estates, which are of more pecuniary importance than most persons suppose. By a recent return, showing the number of lunatics against whom commissions of lunacy are now in force, the total amount of incomes, and the allowance for maintenance, and also the per-centage from 1839 to 1850 on lunatics' incomes received under the Act 3 & 4 Wm. 4, c. 36, and the payments made thereout, it appears that on 11th April there were 514 persons against whom commissions of lunacy are in force, the total of whose annual income amounts to 281,907*l.* 13*s.* 6*d.*, and the total sums allowed for maintenance to 177,825*l.* 8*s.* 5*d.* Of these there are 99 who individually have less than 100*l.* per annum, whose incomes together amount to 5,846*l.* 14*s.* 7*d.*, and the total of the sums allowed for maintenance to 5,679*l.* 6*s.* 8*d.*; 117 who individually have more than 100*l.* and less than 200*l.* per annum, whose incomes together amount to 17,441*l.* 10*s.* 11*d.*, and the total sums allowed for maintenance to 15,238*l.* 19*s.* 11*d.*; 94 who individually have more than 200*l.* and less than 400*l.* a year, whose incomes together amount to 26,536*l.* 8*s.*, and the total sums allowed for maintenance to 21,748*l.* 2*s.* 4*d.*; 56 who individually have more than 400*l.* and less than 600*l.* per annum, whose incomes together amount to 27,348*l.*, and the total of the sums allowed for their maintenance to 21,870*l.* 11*s.* 6*d.*; 47 who individually have more than 600*l.* and less than 1,000*l.* per annum, whose incomes together amount to 35,695*l.*, and the total sums allowed for maintenance to 23,480*l.* 16*s.*; and 65 who individually have more than 1,000*l.* per annum, whose incomes together amount to 169,040*l.*, and the total sums allowed for their maintenance to 89,807*l.* 12*s.*

There are 36 cases in which the incomes have not been ascertained, nor the allowances for maintenance fixed, chiefly on account of the recent dates of the commissions. On the incomes of these lunatics one per cent. has been received under the provisions of the Act, and on 28th June, 1852, there had accumulated a surplus above the payments from 8th January, 1849, of 3,872*l.* 13*s.* 6*d.* (or very nearly one-fourth of the whole amount of per-centage received), which, pursuant to an order of the Lord Chancellor, was transferred to the Suitors' Fee-fund account of the Court of Chancery. By this return it is seen, that much more than one-half of the net incomes arising from the incomes of the whole 514 lunatics against whom commissions are in force, arises from the incomes of 65 lunatics only. It would have been a valuable addition to the return if it had included the whole amount of taxed costs paid out of each estate for the proceedings up to and since the finding of the juries on the commissions.

The Bills for the amendment of the bankruptcy law, and for the consolidation of the criminal law, are not in a state to present the main features with anything like accuracy to our readers, and we believe that the latter Bill is likely to receive such alterations and modifications in the Lords' committee, that a reference to the Bill as it was introduced would be useless, or likely to mislead.

The promised measure for the better management of charitable trusts has not made its appearance; but, as an incident to the introduction by Lord John Russell of his proposed changes in matters of education, notice has been given of the intention to transfer the disputes relating to small charities to the local tribunals. The amount of these small educational charities is, in the aggregate, very considerable, and there is a multitude of villages where the inhabitants can point to the diversion or mal-administration of these small funds, and where the parties interested are practically without the means of relief, or where, in spite of the returns of 1786, and the more recent investigations and reports of the Charity Commissioners, the funds have been unapplied, or diverted from their proper channels. The

local courts will be fit places for correcting these evils, and expense and annoyance will be saved; but when these additional labours are thrown upon the County Court judges, it will be found that a considerable addition must be made to their number.

We have now enumerated the law changes which have been already broached or commenced in the present Parliament: many may not reach the state of an enactment this year; but they prove that the men most competent to renew, to reform, and to consolidate the law, are in earnest in their promises, whatever may be the political or party differences by which they are divided: and we may congratulate ourselves, that whilst we shall have law reform carefully considered, we shall not have hasty legislation, or crude, undigested, or merely speculative alterations unsettling everything, and settling nothing.

ART. VI.—LAW OF PERSONAL PROPERTY.

Principles of the Law of Personal Property, intended for the Use of Students in Conveyancing. By Joshua Williams, Esq., of Lincoln's Inn, Barrister-at-Law. Second Edition. London: S. Sweet. Hodges and Smith, Dublin. 1853.

MR. WILLIAMS is one of the few authors or editors of law books whose labours deserve or justify unqualified commendation. We do not hesitate to say, that his book on the "*Principles of the Law of Real Property*," raised him to the highest reputation as a clear, accurate, and masterly writer, possessing the highest powers as an expositor, and profound knowledge of the philosophy as well as science, of jurisprudence. This work fully maintains the character of its gifted author. It is, we believe, entirely owing to the oversight of the publishers in not sending us the first edition, that its merits

were not then made known to the profession both here and abroad.

To the American Bar especially, we beg to present this work as a fitting associate for the thoughtful productions, with which Story and other eminent Transatlantic jurists have enriched their law literature; for it forms a brilliant exception to the patchwork books hastily huddled together for the speedy supply of the new-edition mania, which has so largely debased and emasculated our own. A compact and well-matured treatise, giving a terse, but full, and intelligent exposition of its subject, bringing out in clear relief the principles of each rule and postulate, and showing how to apply them in practice, is become quite a rare acquisition; and instead of books being valued for succinct exposition of vigorous thought, and discriminating research, they are at any rate *priced*, if not always *prized*, like Cheshire cheeses, by their bulk and weight. We have here a complete treatise on a subject of some complexity and vast importance, amply developed in 326 pages of large type, forming one moderately sized octavo volume. This may not be the readiest road to fifty or sixty pounds, but it is assuredly the only one to an enduring reputation, or to any reputation at all: for the patchwork compilers usually receive more scorn than pelf, even from those who are induced to hire their mechanical services, and the good name of one such author as Mr. Williams will survive the contemptuous recollection of shoals of the book cobblers, past, present, and to come.

This book is intended to supplement its predecessor, and to make that chapter in it which related to this subject, the skeleton, as it were, of the integral work on personal property. That chapter has been omitted in the last edition of the book on real property, where, in fact, it had no fitting place. This work supplies an entire vacuum in our legal treatises; for before its appearance there was no work which gave the student-conveyancer an insight into those principles of the law of personal property which the growth and characteristics of our mercantile community so largely press on his attention. It is one of the great merits of this book, that it does not attempt to give all that could possibly be said on the subject; it develops prin-

ciples; and does not mystify them in a wilderness of cases on abstract points, which the compilers who do so have neither the time nor the capacity to generalise. It is essentially a hand-book of the great features of the law of personal property. And as Mr. Williams very justly remarked in his original preface, "It would be as great a mistake for a student to remain satisfied with his knowledge of a text-book, as for an author to compress into an elementary work all that could possibly be said on the subject." The great merit of such works—avowedly elementary—is that, instead of satiating or disgusting the appetite for further research, they whet its zest and facilitate its digestion of deeper draughts and richer food.

This treatise is divided into these subjects:—

1. *Choses in possession*, such as chattels, which descend to the heir; of trover, &c.; of the alienation of choses in possession, and of ships.

2. *Choses in action*; and first, of torts and contracts; debts; bankruptcy, insurance, &c.

3. *Incorporeal personal property*.

4. *Personal estate generally*. Settlements of personal property; of joint ownership and liability; of wills; intestacy, and mutual rights of husband and wife.

5. *Title*. An Appendix concludes the book, with a very admirably-drawn sum of Letters Patent, and of Marriage Settlement, illustrative of some portions of the book. The chapters on Bankruptcy and on Letters Patent have been almost wholly re-written in this edition, with several additions. The notes throughout are mere references to the sections of statutes or names of cases; not pieces of the subject-matter, which the author lacks either the skill or the diligence to interweave in the text.

In order to give an illustration of the clear and precise style, and the condensed and accurate exposition of the law which this work presents, we take an extract from a branch of universal interest and utility,—the mutual rights of husband and wife as regard personal estate:—

"A husband was, in ancient times, considered absolutely entitled to such personal chattels as his wife might possess. In this respect the law was then both simple and sufficient. By the act of marriage

the wife placed herself under the coverture or protection of her husband. She became, in the law French of those days, a *feme covert*; thenceforth, all demands to which she was personally liable were to be answered by her natural protector. The wife was considered as merged in her husband, and both were regarded as but one person. So long, therefore, as the coverture continued, that is, during the joint lives of husband and wife, the husband was absolutely entitled to all personal property which his wife might acquire, and was also liable to the payment of all debts which she might previously have incurred. These simple principles still pervade the law relating to the husband's interest in his wife's personal estate, although the several different species of personal estate to which modern civilization has given rise, conjoined with rules of equitable administration laid down by the Court of Chancery, have given to this branch of law a perplexity unknown to the simple, though somewhat harsh rules of our ancestors.

"In the first place, then, personal property of the ancient kind, namely, chattels personal or moveable, goods belonging to the wife at the time of her marriage, or given to her afterwards, became the absolute property of her husband, in the same manner precisely as if they had been originally his own, or had been subsequently given to him. He may dispose of them as he pleases in his lifetime or by his will; they will be subject to his debts; and if he should die intestate, the wife will have no further claim to them than to any other of his effects.

"The only exceptions to this sweeping rule are the wife's paraphernalia, so called from the Greek *παραφερνη*, being things to which the wife is entitled over and above her dower. The wife's paraphernalia consist of her apparel and ornaments suitable to her rank and degree; and gifts made by the husband to his wife of jewels or trinkets, to be worn by her as ornaments, are considered as part of her paraphernalia. These articles, equally with the wife's personal chattels, may be disposed of by the husband in his lifetime, and with the exception of the wife's necessary clothing, are also liable to his debts. The wife, also, herself, has no power to dispose of them by gift or will during her husband's lifetime. But paraphernalia differ from the wife's other personal chattels in this respect, that the husband, though he may dispose of them during his lifetime, has no power to bequeath them away from his wife by his will. Gifts of jewels or trinkets made to the wife by a relative or friend, either upon or after her marriage, will generally be considered in equity as intended for her separate use; in which case, they will not be reckoned amongst her paraphernalia, but will, as we shall hereafter see, be exempt from the control and debts of her husband, and may be disposed of by the wife in the same manner as if she were unmarried."

After treating in the same style of choses in actions, both legal and equitable, assignments, releases, &c. by husband, and his liability for his wife's debts before and during coverture, he describes trusts for the wife's separate use at some length,

and shows very clearly the distinct rights of the husband and wife in regard to her personal and real property.

We will give one more extract from a more popular branch of the subject, namely, in the vesting of interests given to children :—

“In the settlement of personal property upon children there are two plans, either of which may be adopted with respect to the vesting of interests given. The one plan is, to vest the interests of the children in them immediately as they come into being, divesting from each of them proportionate shares as others are born, and also divesting the shares altogether, in favour of the others, in the event of the decease of any son under age, or of any daughter under age, without having been married. The other plan is, to vest the interests given only in those who, being sons, attain the age of twenty-one years, or, being daughters, attain that age, or marry under it. So far as the *corpus* of the fund is concerned, the result of each of these plans is the same; the property being ultimately divided only amongst those children who, being sons, live to come of age, or, being daughters, come of age, or previously marry. But with regard to the income of the fund the plans are different. In the first case, the income belongs to the children whilst under age; but, in the second, no interest either in the income or in the principal is given during minority, or, in the case of daughters, until marriage, under age. In the first case, therefore, if the father be dead, the income will be payable to the guardian of the children, toward their maintenance and education; but, in the second case, there will be no provision for these purposes, in the absence of express directions. Such directions, therefore, should, in such case, be always inserted, with a provision for the accumulation of the surplus income, by way of increase of the principal. If, however, the whole property is ultimately to go amongst the children, or if the persons entitled, in the event of the children not living to attain vested interests, should agree, the Court of Chancery will direct the income to be applied for the children's maintenance, in the absence of sufficient provision for that purpose; and even in the face of an express direction to accumulate the income.”—p. 217.

We must here close our extracts of this most able and thoroughly practical volume. It rarely, indeed, happens, that we can more honestly recommend it to every member of the profession, no matter in what branch of it his peculiar walk lies, the subject is one on which he owes it to himself, if he be not satisfied to be a mere mechanical practitioner, to understand; and, if so, there is no work whereby he can accomplish that object with one half the same efficacy or economy of time and trouble.

ART. VII.—ON LORD JEFFREY'S TITLE TO FAME.

Life of Lord Jeffrey, with a Selection from his Correspondence. By Lord Cockburn. Adam and Black, Edinburgh.

THAT Lord Jeffrey was an acute and accomplished critic, possessed of much information, a respectable reasoner, amiable in all the relations of social life, a lively companion, and a fluent talker, we are quite ready to admit. That he was either a genius or an orator, or endowed with any one of the higher powers of the mind, a good writer, a brilliant conversationist, a first-rate lawyer, or even a moderately good judge, we entirely deny. Lord Cockburn,—almost his panegyrist, and certainly his flattering biographer,—amply justifies this opinion in the very ably-written volume before us; though, in all probability, nothing was further from Lord Cockburn's intention than to convey such an impression either of the mental or professional character of his justly-beloved friend.

So thoroughly are we convinced of the genuine kindness of Lord Jeffrey's disposition, that nothing but the impression of a duty induces us to remove any part of the gloss with which his name has been embellished, and his reputation enhanced. We cannot subscribe, however, to the practice of lauding and magnifying the fame of public men because their private lives are estimable. We believe that a great principle depends on a more exact estimate of their merits and failings. Opinion in England is too prone to idolatry. The worship of successful mediocrity is one of our national sins. It has done much to lower the standard of excellence, relax intellectual effort, and often to encourage resort to adventitious modes of attaining fame. Our own profession presents ample examples of this. A certain amount of business insures reputation and its profits more readily than the highest faculties for it. It is no secret that success in the law is not achieved wholly by deserving it, or by the possession of the choicest and most cultivated legal talent. The high places, moreover, are often filled either by success and

interest exclusively. If a man has but a certain amount of business, without any other qualification, the road is open to him to the Bench. Let him have any degree of ability and attainment, without that amount of success, and he has as little chance as if he had never entered the profession. It would be offensive to cite instances—unfortunately but too numerous to need mention—of men uplifted to judicial posts, not only without the requisite qualities for such trust, but labouring under signal disabilities for it. We repeat, that much of this evil results from our false standard of eminence.

Sir Robert Peel was an example of similar means of elevation; or perhaps, in his case, rather of dexterity in reaping the harvests sown by other men, and of putting himself in the van of popular movements at the moment when having emerged from their adversities they became sure of success, no matter at what sacrifice of his own consistency. Nevertheless, the idolatry with which three-fourths of the people have bowed down in worship of Peel, will be hereafter an historical incident in our character, whenever time shall have sufficiently subdued the bias of party to admit of a calm survey of his career, and a dispassionate analysis of his policy.

We must, however, close a digression which will have greatly wronged Lord Jeffrey, if it seems to place him in the same moral category with Sir Robert Peel. We sincerely believe Lord Jeffrey to have been as kind a friend,—as engaging a companion,—as truthful, honest, and good a man, in every relation of social life, as his most ardent admirer can paint him; but we cannot accord him that niche in the temple of fame either as a man of talent or a lawyer, which pardonable partiality, rather than discreet judgment, has assigned him.

It would be unfair to our readers to treat this pleasing memoir as a matter of stern criticism, even if applied to the object of it. So very readable and engaging a work demands a far more elaborate and kindlier exposition. But we will, in the few pages we can alone devote to the higher duty of weighing the claims of Lord Jeffrey to fame, intersperse some notices of the biographical merits with which the work abounds. It begins with his childhood :—

"He was the tiniest possible child, but dark and vigorous, and gained some reputation there (at school) while still in petticoats No muscular accomplishments, except walking, at which he was excellent, were among his triumphs."

At eight, in 1781, he goes to the High School at Edinburgh, where he continued for six years. Here his class-fellows describe him as "a little, clever, anxious boy, always near the top of his class, and who never lost a place without shedding tears." In 1785, he passes to "the rector's class," no very rapid advance in four years. In this class, Jeffrey himself afterwards says: "During my first year I acknowledged only one superior; in the last there were not less than ten who ranked above me."

His six years at school were, therefore, according to his account, passed without distinction even in his scholastic studies: and, according to his biographer, "without any of those early achievements or indications which biography seems to think so necessary for its interests. . . . He escaped being made a wonder of." He next goes to Glasgow College in his fourteenth year. There he did not much mend his previous achievements. He gains no credit, except as a speaker in a debating society, exhibiting critical acumen; while his career at college gave rise to the impression that he possessed "a degree of quickness bordering, as some thought, on petulance." A letter from him, dated 1789, is published at this time, evincing faults of style, of which we shall see that he was never afterwards wholly divested himself.

Lord Cockburn attributes to Jeffrey, at this early period, a habit which would alone account for his subsequent merit, such as it was: "His early passion for distinction was never separated from the conviction that, in order to obtain it, he must work for it. Accordingly, from his boyhood, he was not only a diligent, but a very systematic student." Unfortunately he studied chiefly what an unstable taste dictated.

In 1791 he went to Oxford, and many pages are filled with an account of thirty-one short essays, which he seems to have written under the influence of a perusal of the "Tatler" and "Spectator," which he says he "attempted to ape." Lord Cockburn favours us with one, which certainly does not very

greatly raise his powers of composition in our estimation. Perhaps a single passage will suffice here :—

“Of these essays I have little more to say. I have in truth said, already more perhaps than they deserve. Though, for two reasons, it was impossible to avoid their escape; the one, that it was to myself his contained apology is addressed; the other, that I should otherwise have been at a loss how to have filled a sheet, while, on the first lines, I declared that such was its limitation,” &c.

As this is from a select specimen, we can only say that Lord Cockburn's “wonder how such ideas got into so young a head, or such sentences into so untaught a pen,” is assuredly a less marvel to us, than how such an estimate of the one or the other got into the head of Lord Cockburn. About this time Jeffrey wrote an essay on his own character, which his biographer no doubt judiciously withholds. His next exploit was that of carrying Boswell to bed when very drunk; for which good service, Johnson's jackall, when sober next morning, rewards him by the prophecy, that he, Jeffrey, “may live to be a Bozzy himself yet.” He is home-sick at Oxford, and only by degrees does his “disgust” at it wear off. He finds the young men there “without any feeling, vivacity, or passion;” their parties “the quintessence of insipidity.” His proper study pleases him no better. “This law is vile work; I wish I had been bred a piper.” “Except *praying and drinking*, I see nothing else that is possible to acquire in this place”!! “This place,”^a being the University of Oxford, we leave it to our readers to say whether the young Scotsman made the best use of his opportunities there, or whether he indulged in a morbid disgust at everything around him, whereby he foolishly deprived himself of the many advantages of his position.

It is not, at any rate, surprising that, cherishing such feelings, “in June, 1792, his short connection with Oxford closed.” It was a pity that it ever began; for it gives no favourable idea of the temper, judgment, or common sense of the young student. His vehement relish for Lucretius and Demosthenes, about this time, render it somewhat strange that the studies of Oxford should have been so little in unison with his self-directed pursuits. A curious instance of the fact that few men know their own capacities or likelihoods in very early life, is given in

a letter to his sister while still at Oxford, in which he solemnly predicts that he "shall never be a great man, unless it be as a *poet*!" And then, in a few lines further, "he thinks his poetry is growing worse every week." His misdirected energies were, unhappily, of frequent occurrence, and he wasted much time between 1791 and 1797 in his poetical vagaries.

Lord Cockburn discreetly gives none of his productions, and significantly says that his "poetry was less poetical than his prose; viewed as a mere literary practice, it is *rather respectable*." This is the common failing of all partial biographers, they can admit of no defects, and often prefer unconsciously "damning with faint praise." Jeffrey himself was a fairer judge, and says that his longest piece, a nameless tragedy, was "languid, affected, pedantic, the fable has no meaning, and the characters nothing characteristic." This is far honester than Lord Cockburn's apologetic praise; and we dare say perfectly true. The criticism is at any rate well worded, and we dare say far superior to the subject of it.

It is very possible, however, that much of his after power as a critic was derived from his desultory literary scribblings, and from the parts he took with Lord Lansdowne, Horner, and Brougham in the Speculative Society; though how a pigmy poet and embryo lawyer, as he then was, could have coped or maintained ground with giants such as these, surprises us. Lord Cockburn, however, says that he did; and we are bound to believe it.

After a most able sketch of Scottish politics in those times, Lord Cockburn tells us that Jeffrey was called to the Bar on the 16th December, 1794. Of the law, at this time, in Scotland, Lord Cockburn eloquently says:—

"The legal profession in Scotland had every recommendation to a person resolved or compelled to remain in this country. It had not the large fields open to the practitioner in England, nor the practicable seat in the House of Commons, nor the lofty, political, and judicial eminences, nor the great fortunes. But it was not a less honourable, or a less intellectual line. It is the highest profession that the country knows; its emoluments and prizes are not inadequate to the wants and habits of the upper classes; it has always been adorned by men of ability and learning, who are honoured by the greatest public confidence. -The law itself is not much upheld by

the dim mysteries, which are said elsewhere to be necessary in order to save the law from vulgar familiarity. With a little deduction on account of the feudality that naturally adheres to real property, it is perhaps the best and the simplest legal system in Europe. It is deeply founded on practical reason, aided by that conjoined equity, which is equity to the world as well as to lawyers. There can be no more striking testimony to its excellence than the fact that most of the modern improvements in English law, in matters already settled in the law of Scotland, have amounted, in substance, to the unacknowledged introduction of the Scotch system. Its higher practice has always been combined with literature, which indeed is the hereditary fashion of the profession. Its cultivation is encouraged by the best and most accessible library in this country, which belongs to the Bar."

Jeffrey is now fairly launched at the Scottish Bar. How long he persevered thereat, and how soon his fitful habits sent him adrift, we shall see anon. Certainly, his opening prospects were none of the brightest. "When he sat on its (the Outer House) remoter benches and paced its then uneven floor, so did Scott and Cranstoun, and Thomas Thomson, and Horner, and Brougham, and Moncrieff, and many others who have since risen to eminence." The obscure junior had, however, none of the trickeries and browbeatings malign rivalries and crafty enmities to contend with which so often beset the successful aspirant of the present day at our Common-law Bar. Conceive such a millennium as this:—"They (the Scottish advocates) are a well-conditioned, joyous, and, when not perverted by politics, a brotherly community; without the slightest tinge of professional jealousy"!! There was but little scope for oratory. No civil juries afforded a field for forensic display. Lord Cockburn admits, that Jeffrey's "talents and reputation were his only grounds of hope in his first public scene. These were, however, counteracted by his public opinions, and by an unpopularity of manner which it is somewhat difficult to explain. People did not like *his English*, nor his smart, sarcastic disputation, *nor his loquacity*, nor what they supposed to be an air of affectation." Here were tolerably effective drawbacks, it must be admitted, without enlisting his politics into the account.

He had but few professional acquaintances. Archibald Fletcher and Henry Erskine were among them; of both of

whom Lord Cockburn gives vivid and life-like sketches. Of the style of pleading at the Outer Bar, Lord Jeffrey himself gives no very flattering description, "It is literally a burst of wrangling and contradicting, in which the loudest speaker has the greatest chance to prevail." He "did not feel himself very expert at this trade." Few gentlemen would. Early in 1796 this hopeful lawyer, under these promising circumstances, writes thus of his mode of pursuing the uphill road to legal fame. "The only kind of work with which I have employed myself lately is in translating old Greek poetry, and copying the style of all our different poets, but the weightier matters of the law have been horribly neglected." It is not much to be wondered at, that "the last session passed away with very little increase of profit, reputation, or expectancy." In 1797 he is retained to defend a prisoner, who was unanimously found guilty, and hanged. Lord Cockburn, who, it seems, was a spectator, naively, says,— "I remember being much surprised at the style of the counsel, and at the vulgar overbearing coarseness of the judge,"—one Braxfield.

In the year after this we find him soliloquising on Arthur's Seat, moralising at the lakes, wandering by the "sunny sea," "rejoicing in his escape from the dirty highway of the world," revelling again in poesies and sentimentalities, "going to be literary in London," and "thinking of settling there as a grub"!! To London he accordingly goes, armed with introductions to newspaper editors and booksellers, who cold-shoulder him back again to Edinburgh. He now begins to have misgivings as to the wisdom of his proceedings; but so far from settling down to his chosen avocation, he next fancies he shall go to India, but "does not know for what station he should be qualified." Clearly for none. Whether he had now any parent, or guardian, or friend, endowed with a grain of common sense to guide or advise him, does not appear,—we must presume he had not. We admire the imperturbable affection with which Lord Cockburn, instead of holding up such a reckless career of wild folly, wasted energy, desultory pursuit, and misdirected talent, as a negative example to posterity, quietly remarks :—"These *seeming adversities*, and this obvious ambition, always led him back to

himself *and to the improvement of his own mind*"!!! The seeming adversities were the real ones of his own headstrong folly, and the improvement of his mind was a recurrence to any other pursuit than that which was chalked out for him. We have a high respect for Lord Cockburn: but we deplore these glosses of a guilty perversion of God's gifts, and this countenance given to habits which he well knows, would irretrievably ruin ninety-nine young men out of a hundred, who, deluded by such expressions, applied by a man in Lord Cockburn's position to such aberrations, should fall into similar sins; for we can give Jeffrey's proceedings no other name.

We are next informed of this flighty genius, whose "adversity" it was not to succeed in the profession he utterly neglected, that "*medicine* had great attractions for him;" and so fruitful was this new mode of improving his mind, that he attained "a desultory acquaintance with the science; and, *one way or another*, he *at least* learned enough about it to make him generally a fanciful sufferer and a speculative doctor." A glorious consummation of his mental exercises, verily! He next becomes, according to his own statement, "a zealous chemist," whereupon Lord Cockburn, in the self-same sentence, gravely affirms, that though "his science, as science, was neither deep nor accurate," it was "*of great use to him in his profession*," and "sufficient to set him in this respect above the judges and juries he might have to convince, or any brother he might have to oppose; nor, *except Lord Brougham*, was there any practising barrister even in England, who, in this particular, was his match;" that is, in "science neither deep nor accurate"!! We humbly thank Lord Cockburn for this compliment to the English Bar. He is the best judge how far it be applicable to his own; but pray, let him confine it to the other side of the Border. We, at least, are not accustomed to hold up a desultory or inaccurate knowledge of science as a matter of laudable emulation to our youth, or of advantage to our advocates. It is not deemed a compliment on this side of the Tweed to say of a man, as Lord Cockburn has amply proved might have been truly said of Jeffrey at this period,—that if he had but known a little law, he would have had a smattering of everything. We

are vastly edified by the exception of Brougham from the sentence of universal inferiority in respect of science! passed on the rest of the English Bar. Lord Brougham, who even in his boyish days would have thrown Jeffrey in the heyday of his powers in any intellectual wrestle as he would a miss in her teens, will feel very proud of the compliment, doubtless.

In 1800, having been scarcely three years in actual practice, and having unfitted himself for it on the system we have detailed, he again grumbles at his want of enough business *to afford him subsistence!* The marvel is that he had any at all: and, like all vain people, he lays the whole blame of his own failure and folly on his calling, and talks gravely of the "loitering habits of his nominal profession," as if it, instead of his own ill-regulated mind, was the cause of habits purely his own! The modesty and wisdom of the following passage from one of his letters to a friend are incomparable. The friends who have biographed his most candid exhibitions of his idiosyncracies, are really very honest idolaters, and delightfully ingenuous:—

"I have associated a good deal of late with men of high rank, prospects, and pretensions, and feel myself quite on a level with them in everything intrinsic and material. I cannot help looking upon a slow, obscure, and a philosophical starvation at the Scotch Bar, as a destiny not to be submitted to. There are some moments when I think I could sell myself to the minister, or the devil, in order to get above these necessities. At other times, I think of undertaking pilgrimages, and seeking adventures, to give a little interest to the dull life that seems to await me," &c.

A more thoroughly candid egotist than Lord Jeffrey certainly never breathed. Honesty was one of his first and highest qualities. He got some good advice from his friend, George Bell, about this time: "Let me hear no more of this murmuring nonsense." He told him to pursue his profession, for which he had many qualifications; but "if he felt really averse to it, and unable to bear its drudgery, then to resolve to make a man of himself, and do honour to his country and his family by some literary labour."

In November, 1801, he made a marriage nowise Scottish, for his wife had no money, but every quality which goes to happiness. We honour him for his choice. Up to this year

had never made £100 in any year by his profession. He next dabbles in political economy, and indulges in the oratorical reveries of the Speculative Society.

A sphere was now about to open to him, in which his desultory tastes, critical penchants, and motley attainments qualified him to excel, almost as much as they disqualified him for the Bar. It was in the year after his marriage that he formed one of the junta of friends who ushered the *Edinburgh Review* into existence. It was the salvation of him. It was the sole chance of turning his past life to any useful account. It was one of those lucky accidents which save men born for fortune, however they may slight all rational means of success.

Lord Cockburn gives a glowing account of its vigorous infancy and speedy virility. Jeffrey became its editor in 1803. He devotes himself to it, but still nominally sticks to his profession, and inherits Horner's wig, on his leaving Edinburgh for London. It did not fit him, and Lord Cockburn says: "He and his wig were always on bad terms, and the result was that he very seldom wore one. Throughout nearly the whole of the last fifteen or twenty years of his practice, he was conspicuous, and nearly solitary, in his then black and bushy hair." This fact gives us an insight into the decorum and taste of the then Scottish Bar. In 1804 he again meditates a migration to London, but his wife shortly afterwards died. He remained at Edinburgh; and in 1807 Lord Cockburn says that his practice, which was in all the courts, was always increasing. He practises in the General Assembly. "Its Bar, though beneath him, had several attractions for Jeffrey. It needed no legal learning, and no labour beyond attendance; but always required judgment and management. It presented admirable opportunities for speaking," &c. However, he made but little by it, except popularity. We hear nothing more of his legal career until 1813, when "his clients are left to their fate, and the *Review* to Thomson and Murray," and off he goes to America in search of a lady fair, whom he woos and weds, and brings back to Scotland.

In 1816 occurred another of those lucky incidents whereby men so often rise to an eminence, which assuredly neither

their abilities nor their labours would ever have attained. Juries were introduced. This suited him: much law was not needed, and his acquirements and natural abilities stood him well in stead. Lord Cockburn paints his powers at the new Bar thus:—

“His law, which was now recognised as sufficient for the deepest discussions before the judges, was far more than sufficient for any emergency likely to occur in a court which, instead of getting whole causes to dispose of, had only to investigate certain detached matters of fact specified in previously adjusted issues. He had as great a familiarity with the rules and the philosophy of evidence, as any one either at the Bar or on the Bench. Caution and distrust made him a safe adviser of his client, while no flaw in the case or reasoning of his adversary could escape his acuteness Rarely misled by the temptation of a merely temporary triumph, his general management was judicious and prospective. In sagacity he had no superior. It was his peculiar quality.”

Lord Cockburn, after further expatiating on his merits, gives us a view, fairly enough, of the other side of the tapestry:—

“There was, in truth, a want of plainness, directness, and shortness. But it adds greatly to the merit of his success, that he triumphed over even these defects. An invaluable memory for details enabled him to array and to compare any circumstances, however numerous and complicated; and for whatever difficulty talent was required, he had it in every variety at command. Revelling in the exuberance of his powers, he sometimes put the matter in too many lights.”

It is manifest from what Lord Cockburn says, that Jeffrey owed much of his practice to the popularity of the *Review* which led the van in all great causes. No records of his speeches remain. It is not to be denied that Jeffrey's renown is due to his powers as an essayist and critic. Many of his papers in the *Edinburgh*, when the superficial character of his earlier pursuits had deepened with the limited power of his mind, evince unusual penetration and an aptitude of criticism, especially on all topics of taste. His article on Beauty, in the “*Encyclopædia Britannica*,” is an evidence of this power, despite occasional unsoundnesses of principle.

He afterwards gets retained on Scotch appeals in London before the Lords.

In 1829 Jeffrey was elected unanimously Dean of the Faculty

of Advocates, and accordingly ceased to edit the *Review*. Two years later he went into Parliament, first to an untenable seat for Dundee, and then for Malton, a borough of Lord Fitzwilliam's. He makes, according to Mackintosh, a speech "remarkable for argument and eloquence." But the truth is, that accustomed as he had been to the cheers of partial friends, the cold reception of the House chilled and froze his powers, and he failed. He soon found, besides, that his voice was inadequate, and failing to make himself generally heard, spoke but little. His health failed at the same time. He was, however, made Lord Advocate in 1830, but beyond carrying the Scotch Reform Bill, did but little. In 1832 he was returned, at the head of the poll, free of expense, for Edinburgh. He was often in the House of Lords professionally.

Lord Cockburn will not have it said that Jeffrey failed in Parliament. "*Unless*," he says, "it was as a speaker, he did not fail. He was a *regular attender, a good voter, a wise adviser, and a popular gentleman*:" not one of which are the chief elements of a successful member of Parliament. "Can there not be a good silent member?" Very possibly, indeed; but a member may be both good and silent, and yet not successful in the established acceptation of that term. "If silence is failure," says Lord Cockburn, "then there are five hundred who have failed in every parliament." Not quite so; for failure implies attempt. Many go in without the slightest desire or effort to shine, and cannot be said to fail if they do not. This was far from Jeffrey's case. He had entered the House with a great reputation; his ambition and aspirations are undeniable; and expectation had been aroused by the partial plaudits of his friends in Edinburgh; and as he never had the qualities or powers of a really great speaker, and his eloquence was in fact limited to smartness and nimbleness of tongue, he did fail in maintaining the character which preceded him, in an ordeal where nothing but the highest order of sterling practical knowledge lucidly stated, or perfect eloquence, ever does *succeed*; though respectable mediocrity is always tolerated, as it was in Jeffrey.

In 1834 his professional and parliamentary life closed, and he accepted the judgeship which he held till his death.

It was not until he was elevated to the Bench that some of his worst defects came out in full development; nor, indeed, till, in 1842, he removed to the first division of the Court of Session, where his functions were more publicly exercised, and more akin to our courts *in banco*. Here his unrestrainable loquacity burst forth, and though Lord Cockburn bestows two pages of praise on his judicial virtues, many of which we do not dispute,—and the highest of all, his uprightness and integrity, no one ever did doubt,—still, even Lord Cockburn is constrained to say, that “He had no idea of sitting like an oracle, silent and looking wise. . . . His way was to carry on a running margin of questions, and suppositions, and comments through the whole length of the argument. There are few judges in whom this habit would be tolerated.” Few, indeed! Nor is it much expiated by “great talent and perfect gentleness and urbanity.” Notwithstanding, we can perfectly understand that Jeffrey was, personally, extremely popular with the Bar: his kindness and hospitality would render him so; but of his judicial demeanour we heard too many complaints at the time, to credit his popularity on the Bench, either with the judges he detained, or the advocates he perplexed.

As a writer of English, his style is especially to be avoided: it was discursive, and so redundant in words, that the sense is frequently lost in them; nor is the syntax always correct. We will refer first to the inscription he wrote on Sir Walter Scott's monument as a striking instance; it runs thus:—

“This graven plate, deposited in the base of a votive building, on the fifteenth day of August, in the year of Christ 1840, and destined never to see the light again till the surrounding structures are crumbled to dust by the decay of time, or by human or elemental violence, may then testify to a distant posterity, that the citizens of Edinburgh began on that day to raise an effigy and an architectural monument to the memory of Sir Walter Scott, whose admirable writings were then *allowed to have given* more delight, and suggested better feelings to a larger class of readers in every rank of society than those of any other author, with the exception of Shakspeare *alone*; and *which*, therefore, *were* thought likely to be remembered long after this act of gratitude on the part of the first generation of his admirers *should be forgotten*.”

Not only are the pleonasm here outrageous, the sense obscure,

and the style awkward, but it is bad English. Any boy in the higher form of a good school would be punished for such blunders. The last sentence means simply—"writings which it is thought will be remembered long after this monument is forgotten." In the former part of the inscription he has stated that "the citizens of Edinburgh" erect the monument: and therefore it is incorrect to say in the same sentence that they are the *first generation* of Scott's admirers; unless, indeed, admiration of him is supposed to be confined to the Scottish Athens.

This inscription is fatal to Jeffrey's claims to the reputation of being even a moderately good or correct writer. That it was no hasty production is manifest from its occasion, and the intended permanence of the inscription, and, above all, from the noble subject of it. It would necessarily be his highest effort: and yet it fails in every canon of taste, and sins against the cardinal rules of English composition. It is turgid without beauty, epigrammatic without point, commonplace without common sense, and verbose without expression, completeness, or power.

After this sad exposition of literary poverty in the higher branches of composition, it is but fair to exhibit his far greater faculty for letter-writing. There his powers as an arguer and conversationist resumed their natural sphere, and were not strained beyond the scope of his limited faculties and moderate intellect; and, accordingly, though they exhibit many faults of style, especially that of excessive prolixity, and inaccuracies of expression, they are not devoid of the minor attractions of sprightliness and point. The italics are his own.

(Written early in 1840, but no fixed date.)

"To Mr. EMPSON.—I suppose you admit that *there is privilege* as to some things, and that we have now nothing to do with the question whether *there ought to be*,—whether the rights and powers of House of Commons or Lords, or of Legislature itself, *should be* subordinated as in America, to the judiciary, or be, to some extent, independent? And yet there is a hankering after the American rule, and a constant raising of the question of *what ought to be* in all the anti-privilege argument.

"But, *assuming* that there is privilege within certain limits, the question really comes to be, *who is to judge of these limits? who to*

determine when they have exceeded,—to fix, in short, the distinction between *the use and the abuse*?

"Now, considering either the *actual origin* of privilege, or the *nature* of that sense of public advantage, or *quasi* necessity, which has led to its *assumption*, I have always thought that the power (and the right) of judging to what cases it should apply, *can only* be in the body which possesses it. It is easy to say that if this be so, *anything* may be declared a breach of privilege, and *everything* left to the mercy of an irresponsible despotism, and to state extreme cases, in which startling acts of injustice and cruelty may have actually been perpetrated under this principle. But this is poor, and I cannot but think very palpable, nonsense."

"Is it not answered at once, and quite as sufficiently as it deserves, by directing the same *twaddle* against the courts of law? If *they* are always to judge what is within privilege, may they not at any time determine that there is *nothing* within it? If by leaving the question to the House of Commons *everything* may be brought within privilege, is it not equally clear that, by leaving it to the courts of law, all privilege may be entirely annihilated?

"The short of it is, that while men are but men, we must be at the mercy of a fallible and irresponsible despotism at best; and if I had to choose, as in an open question, I should not hesitate to say that I would far rather have the House of Commons for my despot than the courts of law.

"No reasoning is so puerile as that from extreme or morally impossible cases. They may be of use sometimes to test an abstract proposition of law; but as make-weights in a *practical* question, they are absolutely contemptible. I do not think it makes much difference whether they are purely imaginary, or borrowed from antiquated precedents; and either way they may always be retorted on those who adduce them. Are there no cases of atrocious oppression and injustice in the decisions of those courts of law, to whose infallibility you would have recourse from the *privileged* oppression of Parliament? Are there no such cases in the acts of the *Legislature itself*, which we must all admit to be without remedy. Nay, will any man tell me that there is the smallest chance of any *such* oppression being attempted by the present House of Commons, as has been over and over again inflicted by the whole legislative body?

"Then again as to the quibble, that, in the exercise of privilege the House of Commons is at once party and judge,—I say, that in all cases of disputed *jurisdiction* or contempt (which is precisely the case here) the Court is always both party and judge; and that courts of law have much more of the *esprit du corps*—the unfair leaning to their order—than any other bodies whatever.

"I confess, too, that I can see no ground on which the Courts have recently overruled the privilege of the House of Commons, that might not justify their overruling it, in the cases in which it has been held best established; and has not yet been questioned. Take the privilege for example, of members not being answerable

anywhere, for words spoken in Parliament. It is possible that such words may not only be ruinously defamatory, but capable of being clearly proved to have been dictated by the basest and most abominable personal malice. Why then should not the Court of Queen's Bench, on the grounds lately asserted, allow an action for damages on offer of such proof? The case of an alleged defamation being *published* by the deliberate order and authority of the whole House, seems to me a *far stronger* case for the assertion (or allowance) of privilege, than that of a spiteful individual sheltering himself under that shield; and so, in all the other *admitted* cases under which it would be easy enough to *imagine* the most infamous injustice.

"If it be said that there is *established usage* and precedent for such cases, but none for those recently brought forward, I answer that there is no such series of precedents as would justify these admitted and established cases, on the ground of authority and prescription, without justifying at the same time a great number of other cases, which no one now pretends to justify; that, in point of fact, there are more precedents for a confessedly unjustifiable exercise of privilege than for that which is now *universally* allowed to be just and necessary, and that these established cases have accordingly been so established, *not* on the footing of long usage, but on the general (*not judicial*) recognition of the House of Commons having rightly adjudged them to be *necessary* for the due performance of their all-important functions and duties.

"It is to this necessity accordingly, and to their own enlightened and conscientious sense of it, that the House of Commons has always referred its assertion of privileges, either in former or recent times; and if, in their improved and cautious application of *the principle*, they have seen cause to abandon and recede from many precedents to be found on their records, why or how should they be restrained from now extending it to any new and emerging cases (if any such actually occur), while they feel and are convinced that it is at least as applicable as to any to which it had been previously applied?

"If it be admitted then (and I do not see how it can be denied) that, independent altogether, either of *precise* precedent, or near analogy, it is right and fit that privilege should exist (always meaning by that, not merely the right of adjudging and ordering, in the first instance, but the *absolute exclusion of all interference, review, or control*) whenever it is necessary for the right performance of the highest of all public functions, as those of legislation; then the only question is, whether *the right of judging of this necessity* should (or must) be in the respective legislative bodies themselves, or in the courts of common law? To my mind there can be but one answer.

"But though I should, as a judge, hold the solemn assertion of privilege by the House of Commons as sufficient to *stop* all Courts from thwarting or interfering with it, I cannot disguise from myself that many excellent persons, as well as almost all other *judges* of *jurisdiction* being once raised, on which they are bound to decide, it

is difficult to say that they are not entitled to give out and maintain their conscientious decision, although its enforcement may conflict directly with the orders of one of the Houses of Parliament. *Both* parties in short, as in all cases of disputed jurisdiction, may not only be right *in foro poli*, but be under an indispensable obligation to enforce their conflicting decisions. You in England may have generally been able to get out of the difficulty by appeal to the Lords. But with us in Scotland, it is truly as inextricable in this contest about privilege, as in the case of conflict between the Session and Justiciary, and in the late memorable *lutte* between Session and General Assembly; both Justiciary and Assembly being absolutely final, and admitting of no appeal to any other tribunal. In many respects, indeed, these cases are strikingly parallel to the present; for as there is no review of the decisions of the Commons by appeal to Lords, and as, in point of fact, these conflicts upon privilege have often been *with the Lords themselves*, it is obviously quite absurd to suppose that they either ever would, or *ought* ever, to recognize any higher jurisdiction in the appellate law court, than in those lower ones with which their conflict may have begun. It may be doubted whether it was wise even to plead to the *jurisdiction* in these courts, but of course they never could plead to anything else, nor without a full disclamation of any obligation to stand by the decision.

"The only remedy, then, for this conflict must be by *legislation*; and though I foresee infinite difficulty in adjusting the terms of any enactment on the subject, I confess I do not go along with those high advocates of privilege who maintain that they ought to resist any attempt to bring in *even an unobjectionable statute* in regard to it. Even they, I should think, would scarcely maintain that it would not be for their ease and dignity, as well as for the general good, that an Act should be passed *interdicting and enjoining the Courts of Law* from entertaining any suit importing a disallowance of any assertion of privilege by House of Commons, as to certain matters and things; and I confess *this* would be the leading and main enactment of any statute I should like to see proposed on the subject. But I should have no objection to its also containing a disclamation of all claim of privilege, in those cases of admitted abuse which have actually occurred, and in such other cases as might be agreed upon; and though it might be difficult to come to an agreement, yet I do not think it altogether hopeless, considering the constant vexation of such discussions as the present; and above all, I can see no reason why the House should refuse to enter upon the consideration, as they are quite certain that no act can ever pass except with their full and deliberate assent to everything it contains. * * *

"Here is my last word about privilege: you do not admit that the House of Commons has right to exercise (without control) all the powers which *it thinks necessary* for its legislative functions. But I think you do, and *must* admit, that it has and ought to have, all that *are* truly necessary for that purpose; and the sole question therefore is, *who* is to judge what are so necessary? Upon all *constitutional*

and rational grounds, I hold that House of Commons as much fitter and safer than any court of law, or the whole twelve nominees of the crown in a body. Though you do not admit *my principle* to this extent, you must admit (if you have a particle of candour) that, for the purpose of settling what is, and should be, privilege, the *principle, test, and rule of judgment*, must be what is truly necessary, or very material, for the best discharge of legislative duties? and that all reference either to *precedents* or *abuses* is wholly and generically irrelevant. If you do not admit this, I think you are not to be argued with; and the admission brings the case at once to the point I have mentioned.

"This is the *first stage* of my argument, and in substance there is but another, and that is, that the whole question as I have now stated it, being plainly and rigorously a question of *conflicting jurisdiction*, each of the courts or bodies must have an *equal right* (or duty) to adjudicate upon it, when brought before *them*, and be equally liable to the temptation of deciding it in their own favour—the *matter* to be adjudged being in all cases the same—viz., Whether the privilege asserted or questioned in any particular case, is truly essential to the right exercise of legislative functions? which, again, is plainly either a question of *fact* and experience, or of mere *constitutional policy*, and never, in any just sense, a question of *law*.

"This is the sum of my argument; and I think I am right in saying that it is not so much as touched by —'s declamation, and but slightly by the details and reasonings of —.

"The whole, then, resolving into a conflict of independent and supreme jurisdiction, I agree that there is no final or practical solution but by *legislation*, upon the assumption (now, I fear, but too necessary) that neither party will be convinced by the reasoning of the other. I do not, therefore, go at all along with those who hold legislative interference incompetent or unconstitutional—which, indeed, cannot, I think, be even consistently asserted. But the question for the legislature is necessarily a question of *state policy*, and nothing else, and one upon which public opinion ought to be previously matured by large public discussion.

"*This* may be one answer to your pragmatistical and empirical question, why the two Houses, having common cause, and substantial power over the Crown, do not at once settle the matter by an Act, which they evidently may have all their own way? The necessity of taking public opinion with them is one answer. But practically there are many others,—1st, the two Houses are jealous of each other, and not likely to have the same specific questions of privilege before them at the same time, and so might justly apprehend unreasonable factions and unfair interference mutually; and 2nd, to do any good the statute should embody a full *code* of privilege, which it would obviously be infinitely difficult to digest, while a successive settling of special questions by consecutive enactments would not go to the root of the *conflict*, and would every day lead to greater risk

of inconsistency and injustice, yet I think such a course will soon be inevitable."

We have selected this from a host of his letters in the second volume, because the subject is one which develops his view and powers on a subject more germane to jurisprudence than nine-tenths of the gossiping epistles with which he favoured, and we doubt not charmed, his friends : for the amiability of the man was beyond a question. The above is a very favourable specimen of his best style of writing.

We have felt bound to make an extract thus long, in order to afford full means of testing the justice of our judgment ; especially as to the entire absence of that concentration of thought which is indispensable to all high mental power. It is a curious and significant fact that Jeffrey never had a decent library.

We do not embark in the question, how far his own contributions to the *Edinburgh Review* did or did not add to its robust growth, and at one period gigantic power, or whether they ministered to both, rather as the ivy graces the oak. This is a subject foreign to our Review. The *Edinburgh* has just now passed into its second dynasty since the resignation of the editorial throne by Jeffrey, and we hail the promising noviciate of its new and highly-gifted editor. It augurs of a brilliant *avenir*. We heartily rejoice at it, for it has much drowsy mediocrity to redeem.

To sum up Jeffrey's character, he was a good man, a true friend, a smart talker, a mediocre speaker, a bad writer, a superficial scholar, an acute critic, a poor lawyer, and a garrulous judge.

ART. VIII.—COMMON LAW PROCEDURE ACT.

AMENDMENT—WRIT AND COPY—STATUTE OF LIMITATIONS.

THE debt, to recover which this action was brought, became due on the 13th of October, 1843. On the 13th of October, 1849, a writ of summons was sued out, and was duly continued by *alias* and *pluries* writs, issued according to the provisions of the 2 Wm. 4, c. 39, s. 10. The last of these writs was issued on the 28th of May, 1852, and was served on the 24th of September in that year; but in the indorsement on that writ, the date of the first writ of summons was by mistake stated to be the 22nd of October, instead of the 13th of October. The defendant having appeared, a declaration was delivered, to which he pleaded the Statute of Limitations. The plaintiff, then, for the first time becoming aware of his error, obtained a rule calling upon the defendant to show cause why the memorandum of the date of the first writ, indorsed upon the *pluries* writ of summons, issued on the 28th of May, 1851, and on the copy of the same writ served upon the defendant on the 24th of September, 1851, should not be amended by altering the date of the first writ of summons therein mentioned, from the 22nd of October, 1849, to the 13th of October, 1849. The application to amend was made under the 222nd section of the Common Law Procedure Act, which enacts as follows :—

“It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at *nihi prius*, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments shall be made with or without costs, and upon such terms as to the Court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.”

Upon argument on showing cause against the rule, it was urged on behalf of the defendant that the above section did not

apply to a case where the process was entirely invalid at the time when the Act passed; that the 2 Wm. 4, c. 39, s. 10,¹ was not complied with; that the Court would not have amended previous to the passing of the Common Law Procedure Act, and had no powers to do so now. For the plaintiff, in support of the rule, it was urged that, previous to the passing of the Act, there had been a conflict of decisions whether writs could be amended in this manner so as to save the Statute of Limitations;² that, placing a fair and liberal construction upon the 222nd section of the Common Law Procedure Act, it was evident that the object of the Legislature in passing it was that it should give a power of amendment in cases of this description.

Lord Campbell, in delivering the judgment of the Court, said:—

“I feel considerable difficulty in making this rule absolute in its terms, so as to include the amendment of the *copy* of the writ served on the defendant, which is no part of our records. If we amended the copy it might be said that we ordered a fiction, as it would indicate that the writ had been served on the defendant with a proper indorsement. That portion of the rule, therefore, must be discharged; but I am clear that the rest must be made absolute. It is

¹ 2 Wm. 4, c. 39, s. 10, enacts: And be it further enacted, That no writ issued by authority of this Act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant, therein named, may not have been arrested thereon or served therewith: Provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration; and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ; and return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable by the plaintiff or his attorney suing out the same, as the case may be.

² See *Williams v. Williams*, 10 Mee. & W. 174; S. C. 2 Dowl. N. S. 209; *Carne* and another *v. Malins* and others, 6 Exch. Rep. 803; S. C. 20 Law J. (N. S.) Exch. 434.

not necessary to analyze all the former cases, one or two of which certainly seem to show that the power of making such amendment existed according to the former practice. I formed my judgment on sect. 222 of the 15 & 16 Vict. c. 76, which clearly reaches this case. The debt would have been barred on the 22nd of October, 1849, but on the 13th of October a writ regularly issued, and was regularly continued by other writs up to the 28th of May, 1852, when a *pluries* issued in very good time to prevent the first writ expiring; but on the back of it there was a clerical error in stating the date of the first writ to be the 22nd instead of the 13th of October, 1849, its true date. If that indorsement stands, it prevents the plaintiff from availing himself of his right of action, which really exists; but if we may amend according to the fact, the Statute of Limitations will be no defence, and the plaintiff may recover according to the justice of the case. Have we not then the power to make this amendment upon one of our own records? We may make all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties. Here the real question is, whether there is a debt, and whether it is barred or not by the Statute of Limitations. Are we not, therefore, at liberty, according to the truth, to order this amendment? I think we have such a power, and that we ought to exercise it. It is said that it will be wholly inoperative, as the defendant will still be at liberty to take advantage at the trial of the erroneous indorsement. As at present advised, I think he cannot do so. I at first thought that the 2 Wm. 4, c. 39, required that the writ should be served with the indorsement upon it, but that is not so. This *pluries* writ was well issued in continuation of the original writ, and the statute, therefore, will not bar."—*Rule absolute to amend the writ.* *Cornish v. Hocking*, 22 Law J. (N. S.) Q. B. 142.

2. *Adding Count.*—In an action for goods sold and delivered, tried before Jervis, C. J., at the last Warwick Assizes, it became necessary to add a count to the declaration for work, labour, and materials; and the plaintiff accordingly applied to the judge to amend the declaration by adding such count, pursuant to 15 & 16 Vict. c. 76, s. 222. The learned judge made the amendment, reserving leave to the defendant to apply to enter a nonsuit in case the above provision did not authorize the amendment. On motion made in pursuance of this leave, it was urged that adding of a count in a declaration was exercising a greater power of amendment than was given by the words of the 222nd section, and that if such an amendment as this were within the section, a count for goods sold could under it be converted into one for slander. But Crompton, J., to this last objection

answered that that would be an amendment for the purpose of determining in the existing suit the question in controversy. In an action for goods sold, slander could not be the question in controversy; and the court was strong in its opinion that the amendment came within the provision of the Act. Lord Campbell, in giving judgment, said:—

“I have no hesitation in expressing my clear opinion that the judge at *nisi prius* had power under the new Act to make this amendment, which was necessary for doing justice between the parties in the controversy then pending.”

And Mr. Justice Crompton added:—

“All that is necessary to determine with a view to amending, is, Was this an amendment?—It was. Was it an amendment in the existing suit?—It was. The only other point that could be raised was, whether it was imperative on the judge to make the amendment when asked; and of that there could be no doubt.”—*The rule was therefore refused. Taylor v. Shaw*, 21 L. T. Rep. 58.

Although the above decision of *Cornish v. Hocking* does not carry the power of amendment much further than that which had been exercised previously to the passing of the Common Law Procedure Act; yet, from the tone assumed by the judges during the argument upon, and in their judgments in that case, and more especially from the subsequent decision in *Taylor v. Shaw*, it is evident that the powers of amendment contained in the 222nd section will be freely and liberally exercised. Hitherto amendments have been for the most part confined to variances between the pleadings and the evidence offered in support; and even then justice was often forbidden by reason of the weak hand with which those amendments were made: but surely the words, “All such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made,” will be amply sufficient to remedy much of that enormous evil that has hitherto existed in the too strictly technical rules of our common law practice. It is an evil which has alienated the public from the profession, and has invoked the cloud in which that profession is now enveloped. We have great hope that a liberal application of the powers contained in this section will tend much to remedy the evil, and its effects; and sure are we

that the judges will not allow the impressions—we will not say, prejudices—of their more technical legal education to interfere with the application of such a remedy to such an evil. The Chief Justice of the Common Pleas showed his determination to carry the provisions of the Act into effect by his decision in the case of *Mitchell v. Crosswall* and another. Our readers will probably recollect that in that case (which was inserted in our last number, and has since been reported in 22 Law J. (N. S.) C. P. 100) a plea, which at the trial was supposed to be the only means of raising the real defence, was by the Chief Justice permitted to be added at *nisi prius*, and the Court of Common Pleas, when the case afterwards came before it on another point, did not condemn, although one of its members doubted, the decision. It has still, however, to be decided whether the section extends to the amendment of documents collateral to the suit: for instance, on application at judges' chambers to discharge from arrest on the ground of privilege, could an affidavit used in support of the application, and which was wrongly intitled, be amended under the provisions of the Act? We fear that such an application could scarcely be deemed as "any proceeding in civil causes," neither would it be included in the words, "the real question in controversy in the existing suit;" and yet, if it be just to add a plea at *nisi prius*, *à multo fortiori* ought such an amendment to be made. We know that the *fiat justitia* must yield in some cases to regularity of proceeding, and uniformity of decision; but surely it is not unreasonable that the judges should be permitted to exercise this discretion of amendment in the less important proceedings that are incidental to a suit, as well as in the main subject of controversy.

COMMENCEMENT OF OPERATION OF ACT—JUDGMENT ISSUING— EXECUTION THEREON.

In this case judgment had been signed more than a year and a day, but less than six years before the Act came into operation. The judgment had not been revived by *scire facias*, and prior to the new statute execution could not have been issued, without

that step being taken. The 128th section of the Common Law Procedure Act enacts:—

“ During the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias* and within six years from the recovery of the judgment, execution may issue without a revival of the judgment.”

And by the 129th section it is enacted:—

“ In cases where it shall become necessary to revive a judgment by reason either of lapse of time or of a change by death or otherwise of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may either sue out a writ of revivor in the form hereinafter mentioned,¹ or apply to a Court or a judge for leave to enter a suggestion upon the roll, to the effect that it manifestly appears to the Court that such party is entitled to have execution of the judgment, and to issue execution thereupon.”

A motion was now made (*quia timet*) for a rule, calling upon the defendant to show cause why a suggestion should not be entered upon the roll, and execution issued pursuant to the provisions of the 129th section of the Common Law Procedure Act.

The Court, however, held that the motion was unnecessary; that execution could issue under the 128th section, as that section must be taken to apply to judgments existing before, as well as to those signed after the Act came into operation, and therefore refused the rule. *Boodle v. Davis*, 22 Law J. (N. S.) Exch. 69. (S. C.) 17 Jur. 93.

EJECTMENT—INSUFFICIENCY OF DISTRESS—AFFIDAVIT—

DOE *d.* POWELL *v.* ROE OVERRULED.

In an action of ejectment, brought pursuant to section 210² of

¹ See sect. 131.

² Section 210 re-enacts the 4 Geo. 2, c. 28, s. 2, and enacts, “ In all cases between landlord and tenant, as often as it shall happen that one half year’s rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage; or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in

the Common Law Procedure Act, a motion was made for judgment.

The affidavit used in support of the motion stated, that three quarters' rent were in arrear, and that there was no sufficient distress upon the demised premises to countervail the arrears due. In the case of *Doe d. Powell v. Roe*,¹ which was decided upon the same enactment in the 4 Geo. 2, c. 28, s. 2, it was held necessary, that the affidavit should show that the distress was insufficient to countervail half a year's rent. But the Court in this case thought that the affidavit, following the exact words of the statute, was sufficient, and overruled *Doe d. Powell v. Roe*. The rule was therefore made absolute. *Cross v. Jordan*, 22 Law J. (N. S.) Exch. 70.

**ERROR—SETTING DOWN FOR ARGUMENT—REGULÆ GENERALES,
HIL. T. 16 VICT. REG. 67.**

AN application was made to the Court as to the construction of the 67th of the new rules. That rule orders:—

“After the suggestion of error in law, alleged and denied as prescribed by the Common Law Procedure Act, 1852,² is entered, either party may set down the case for argument, and forthwith give notice in writing to the opposite party, and proceed to the argument thereof as on a demurrer, without any rule or motion for a *concilium*.”

In this case error had been duly brought under the Common Law Procedure Act, but the Master refused to set it down

such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made to appear to the Court where the said action is depending by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon without paying the rent and arrears together, with full costs.” &c.

¹ 9 Dowl. P. C. 548.

² See section 152.

except for a day in term. The Court, however, said, that as, according to the rule, it may be set down and proceeded on to argument as on demurrer, which, under the 59th section, requires only four days, the same rule would apply here, and so intimated to the Master. *The South-Eastern Railway Company v. The South-Western Railway Company*, 22 Law J. (N. S.) Exch. 72.

PLEADING—STATUTE OF LIMITATIONS.

A rule had been obtained, calling on the plaintiff to show cause why the replication in an action should not be amended under the 15 & 16 Vict. c. 76, s. 52.¹ The declaration contained four counts; the two first being on mortgage deeds, and the two last on bonds collateral with them. To the first count, the defendant pleaded that "the cause of action mentioned in the first count did not accrue within twenty years before this suit;" to which the plaintiff replied, that "the defendant, before the commencement of this suit, made an acknowledgment that the debt, in the first count mentioned, remained unpaid, and due to the plaintiff within the true intent and meaning of the statute in that behalf made and provided: and that this action was brought within twenty years after such acknowledgment was so made, as aforesaid. There were similar pleas and replications to the other count. There was also an affidavit of the defendant, stating that he was ignorant what acknowledgment the replication referred to, and that he would be unfairly embarrassed in the conduct of his cause. Martin, B., at chambers, had declined to interfere. It was now urged, that the replication would have been good even on special demurrer before the passing of the statute (to this, however, the Court dissented); but that even if it would have been so, this was not a pleading calculated to embarrass the defendant within the 52nd

¹ Section 52 enacts, "If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the Court or a judge to strike out or amend such pleading, and the Court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such Court or judge shall see fit."

section of the Act. The Court, however, thought otherwise, for as under the 3 & 4 Wm. 4, c. 42,¹ a specialty which has lost its force may be revived in any of three ways, *i. e.*, acknowledgment in writing by the party, acknowledgment in writing by his agent, or part payment; it would be embarrassing to the defendant to be compelled to come prepared to meet three different matters, when the plaintiff may intend to rely upon only one, and therefore made the rule absolute. An application that the plaintiff should be ordered to specify the dates of the acknowledgment he intended to rely upon was refused. *Forsyth v. Bristowe*, 22 Law J., Exch. 70. (S. C.) 17 Jur. 46.

2. DOUBLE REPLICATION—SETTING ASIDE JUDGMENT.

IN an action originally commenced in the County Court of Frome, but removed by the defendant into the Court of Common Pleas, the plaintiff had declared; stating that the plaintiff and defendant agreed, amongst other things, that the defendant should serve and be employed by the plaintiff, as his clerk, at the salary of 1*l.* per week, and that the defendant would not leave that service without notice, yet while the defendant was in that service he left it without notice. To this declaration the defendant pleaded, that during the time the defendant was in the employ of the plaintiff, and without any just cause or provocation whatsoever, the plaintiff used gross and improper language to him, and called him by a false and opprobrious name, and insulted him, and greatly wounded his feelings; and in consequence thereof, and as he was justified in doing,

¹ 3 & 4 Wm. 4, c. 42, s. 5, enacts, "If any acknowledgment shall have been made either by writing signed by the party liable, by virtue of any such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction as aforesaid, or in case the person entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then, within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be, the plaintiff in any such action, on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid in answer to a plea of this statute."

he gave the plaintiff notice that he should forthwith leave his service and employ; and did thereupon accordingly do so.

Replication: The plaintiff takes issue on the defendant's plea; and further says, that the notice intended in the declaration was a reasonable and proper notice; but that the notice mentioned in the defendant's plea was not a reasonable or proper notice. The defendant, on the ground that this replication was double, and pleaded without leave of the Court or a judge, signed judgment, under the 86th section of the Common Law Procedure Act.¹ A rule *nisi* having been obtained to set aside this judgment, upon cause being shown, it was argued that the replication was double; the first part of it was pleaded under the 79th section of the Act, and was to be "deemed a denial of the substance of the plea;"² that as the substance of the plea was, that the defendant was insulted, and therefore was at liberty to leave the plaintiff's service, the replication, by its second part, raised a second defence as to the giving of the notice, and therefore could not be pleaded without the previous leave of the Court or a judge. To this it was answered, on the part of the plaintiff, first, that the rules of pleading contained in the Common Law Procedure Act, only apply to actions commenced by writ of summons in the superior courts, and not to those removed (as in this case) from courts of inferior jurisdiction. Secondly, that if the replication were double, the defendant ought not to have signed judgment under the 86th section, but should have applied to the Court or a judge to

¹ Section 86 enacts, "Except in cases herein specifically provided for, if either party plead several pleas, replications, avowries, cognizances, or other pleadings, without leave of the Court or a judge, the opposite party shall be at liberty to sign judgment: Provided that such judgment may be set aside by the Court or a judge, upon an affidavit of merits, and such terms as to costs and otherwise as they or he may think fit."

² Section 79 enacts, "Either party may plead, in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon, which joinder of issue may be as follows, or to the like effect: 'The plaintiff joins issue upon the defendant's first (*&c. specifying what or what part*) plea;' 'The defendant joins issue upon the plaintiff's replication to the first (*&c. specifying what*) plea;' and such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading, and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant."

amend it under the 52nd section of the Act.¹ And, lastly, that the replication was not double, but only informal, and that the informality was rendered necessary by the defendant's plea. The Court, however, said that it had power to do justice on such terms as it thought fit; and accordingly made the rule absolute for setting aside the judgment, the plaintiff undertaking to strike out the second part of his replication, and to be at liberty to apply to a judge, if so advised, under the 52nd section, to render any ambiguity in the plea. The rule was made absolute; without costs.—*Messiter v. Rose*, 22 Law J. (N. S.) Exch. 78.

LIST OF CASES.

- Boodle v. Davis*—Commencement of operation of Act—Judgment—Issuing execution thereon, 22 Law J. (N. S.) Exch. 69. (S. C.) 17 Jur. 93.
- Cornish v. Hocking*—Amendment—Writ and copy—Statute of Limitations, 22 Law J. (N. S.) Q. B. 142.
- Cross v. Jordan*—Ejectment—Insufficient distress, *Doe d. Powell v. Roe*, overruled, 22 Law J. (N. S.) Exch. 70. (S. C.) 17 Jur. 93.
- Forsyth v. Bristow*—Pleading—Statute of Limitations, 22 Law J. (N. S.) Exch. 70. (S. C.) 17 Jur. 46.
- Messiter v. Rose*—Pleading—Double replication—Setting aside judgment, 22 Law J. (N. S.) Exch. 78.
- South-Eastern Railway Company v. South-Western Railway Company*—Error, setting down for argument, 22 Law J. (N. S.) Exch. 72, *Taylor v. Shaw*—Amendment, adding count, 21 Law J. Rep. 58.

ART. IX.—CRIMINAL TABLES FOR 1852.

WE are indebted to the courtesy of Mr. Redgrave, of the Home Office, for the materials of this abstract of the Commitments and Punishments in 1852; of which the Annual Tables will be published in a few days.

The Commitments for Trial in 1852 show a trifling decrease

¹ The 52nd section enacts, "If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the Court or a judge to strike out or amend such pleading, and the Court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such Court or judge shall see fit."

on the numbers in the preceding year, but are substantially the same as in the three last years. Nevertheless, the increase in the last five years is unabated. The three last quinquennial periods are as follow:—1838 to 1842, 133,793; 1843 to 1847, 134,376; 1848 to 1852, 140,448. In 1852 they were 27,510.

The decrease of last year is 450 commitments, or 1·6 per cent. "It has extended," says Mr. Redgrave, "to twenty English counties, half manufacturing and commercial, and half agricultural, but it has not been particularly marked in any one of them. The same may be said of the small increase which is spread over the remaining twenty counties. Of the twelve Welsh counties, in seven there was a decrease of the commitments; in four an increase; in one the numbers remain the same. In Glamorganshire the increase has been large, and the commitments have doubled in the last five years." It will be curious to ascertain how this is.

In *Offences against the Person*, the totals continue nearly the same as in 1851. There is an increase in murder, and the attempts to murder; and also, amounting to 65 per cent., for concealing the births of infants, an offence often closely allied to murder; but a considerable decrease in the commitments for stabbing, wounding, &c., and manslaughter. In rape there is a decrease; in the assaults with intent to ravish, an increase. For the new offence of assault and inflicting bodily harm, under the stat. 14 & 15 Vict. c. 19, there have been no less than 321 commitments. "It seems," says Mr. Redgrave, "most probable that many offences of this description, heretofore indicted as felonious, have been indicted under this statute, more especially as they are thereby brought within the jurisdiction of the quarter sessions; and to this cause may probably be attributed in some degree the decrease of the commitments already referred to for stabbing, wounding, &c."

In the 2nd class—*Offences against Property with Violence*—there is a decrease of 4·1 per cent., arising chiefly on burglary and housebreaking, which decreased 13·7 per cent., while, on the other hand, robbery increased in nearly the same ratio, 13·5 per cent.

In the 3rd Class—*Offences against Property without Violence*

—the commitments have decreased 2·7 per cent. Cattle, horse, and sheep stealing have each decreased, as have also larcenies from the person; while larcenies by servants, and frauds, have increased.

In the 4th Class—*The Malicious Offences against Property*—there is a decrease of 11·1 per cent., which extends over all the offences of the class.

In the 5th Class—*Forgery and Offences against the Currency*—there is an increase of 11·2 per cent., which arises exclusively on uttering counterfeit coin, an offence which has shown a constant increase of the commitments for the last seven years. The numbers for forgery remain nearly the same in the last two years.

In the 6th Class, comprising all the offences not properly falling within the previous classes, there has been an increase of 22·9 per cent., arising upon riot and breach of the peace, and perjury; the commitments for the latter offence having nearly trebled since the operation of the stat. 14 & 15 Vict., which renders parties to suits liable to give evidence. The offences against the game laws, included in this class, decreased 15 per cent. Arson and maliciously killing cattle, offences against the game laws, cattle, horse, and sheep stealing, housebreaking, and burglary have slightly decreased.

The classes of offences have varied during the last 15 years as follows :—

	1848-52.	1843-47.	1838-42.
1st Class. Offences against the person ...	10,425	10,975	10,016
2nd „ Offences against property, committed with violence ...	10,297	8,999	8,955
3rd „ Offences against property, committed without violence...	110,431	105,835	105,017
4th „ Malicious offences against property	1,296	1,170	634
5th „ Forgery, and other offences against the currency ...	3,747	2,585	2,551
6th „ Other offences (chiefly riots, assaults, &c.) ...	4,252	4,812	6,620
Total ...	140,448	134,376	133,793

It is unsound, in the face of these incontestible facts, to say
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that, taking into account the immense progress in mental and moralising agencies, crime is decreasing, as Mr. Hill and other optimists broadly contend.

The stringency of punishment is nevertheless on the decline. The proportion acquitted and discharged has for the last six years shown a small but gradual decrease, which has continued in the last year. This proportion has been:—1852, 22·4 per cent.; 1851, 22·7 per cent.; 1850, 23·2 per cent.; 1849, 24·4 per cent.; 1848, 24·4 per cent.; 1847, 25·1 per cent.; 1846, 27·6 per cent. The proportion in 1852 is made up of 17·0 per cent. found not guilty on trial, 5·0 per cent. no bills found, 0·4 per cent., not prosecuted; the decrease in the last year being in those discharged by reason of no bills being found.

The secondary punishments last year are remarkable for the diminished numbers sentenced to transportation, and the decrease of two-thirds in those sentenced to transportation *for life*; a sudden falling off, which is not by any means accounted for by a corresponding decrease of those violent offences for which this extreme secondary punishment is usually inflicted. The repeal of the punishment of transportation on a first conviction for simple larceny by the stat. 12 Vict. c. 11, will, to some extent, explain the diminished numbers sentenced to transportation; but the more lenient administration of the law, and in the last four years the decrease of the commitments, have had an equal share in the result.

In the last four years, during which the commitments have varied little in their total amount, the numbers sentenced to transportation have been:—In 1852, 2,535; in 1851, 2,800; in 1850, 2,578; in 1849, 2,884.

The capital offences of which offenders were convicted last year were as follow:—

Murder, 16; attempts to murder, attended by dangerous bodily injuries, 11; maliciously cutting and wounding, 0; sodomy, 14; burglary, with violence to persons, 13; robbery, attended with wounds, 5; arson of dwelling-houses, persons being therein, 2: total 61.

Of the above capital convictions in 1852, the judgment of death was recorded upon 42, so that the sentence to be hanged

was passed upon 19 only, and of this number nine were executed, seven males and two females. These offences were in each case murder, for which alone, since 1841, with one exception, execution has taken place. Of the seven males, one was executed for the murder of his wife, who was on the point of leaving him for his repeated ill-usage of her; one for the murder of his own illegitimate child; one for the murder of the illegitimate child of his wife, before her marriage with him; one for the murder of the illegitimate child of a woman with whom he cohabited; one for the murder, from revengeful feelings, of a respectable female who had dismissed him from some occasional employ; one, a foreigner, for the murder and robbery of his uncle on the highway; and one for murder and robbery on the highway. Of the two females, one was executed for the murder of her mother-in-law, to obtain the reversion of a small property; one for the murder of her husband by poison.

The males and females, separately, are shown this year in a new form, so as to distinguish the numbers, and to afford the means of comparison of the commitments in each county for the last ten years. This is a great improvement. The numbers in 1852 still prove a continuance of the proportional increase of females, which has been uninterrupted since 1848. In 1851 it was 24·8 to 100 males, and in 1852 it was 25·7.

The above figures show the mean rate of increase or decrease in the proportion which the females bear to the males; but the results, which assume great regularity when the totals alone are compared, are widely different when examined with regard to separate counties. Selecting those which are most important from their population and extent, and comparing the total of the five years 1843—1847, with the total loss of the five years 1848—52, it appears that :—In Middlesex the decrease of males was 12·1 per cent.; of females 7·9 per cent. In Lancashire the increase of males was 5·3 per cent.; of females no less than 14·7 per cent. In Yorkshire, comprising at the same time a large share of manufacturing and agricultural population, the increase of males was 16·5 per cent.; of females 14·5 per cent. In Cheshire, the males increased 19·2 per cent; the females 20·8 per cent. In Staffordshire the males increased

16·6 per cent.; the females *decreased* 1·0 per cent. In Derbyshire the males increased 2·5 per cent.; the females *decreased* 16·2 per cent. In Nottinghamshire the males increased 13·5 per cent.; the females *decreased* 29·6 per cent. In Leicestershire the males decreased 23·8 per cent.; the females 14·7 per cent. In Warwickshire the males increased 6·8 per cent.; the females 1·5 per cent.

Contrasting these counties, which are chiefly manufacturing and commercial, with some of the more purely agricultural, it is shown that:—In Lincolnshire the males increased 10·4 per cent.; the females 1·3 per cent. only. In Essex the males increased 5·7 per cent.; the females *decreased* 26·1 per cent. In Suffolk the males increased 7·2 per cent.; the females *decreased* 4·4 per cent. In Wilts the males decreased 3·6 per cent.; the females 11·8 per cent.

“These results,” as Mr. Redgrave truly remarks, “are remarkable. The great proportionate increase of females in Lancashire, Yorkshire, and Cheshire, where females, employed in the great staple manufactures of those counties, are congregated in large numbers, contrasts strongly with the proportion in the adjoining counties of Derby, Nottingham, and Leicester, also the seat of the smaller textile manufactures requiring female labour, but in which counties the female commitments have greatly decreased, and the male commitments increased.”

We invite local explanations from the counties where these anomalies have occurred. We take moreover this occasion to suggest to our numerous readers in the provinces the valuable light that might be thrown on many topics of jurisprudence if they would kindly communicate to us more frequently and fully the results of their experience and reflection. We shall gladly receive, and enable our readers to profit by them.

New Leading Cases.

[It is intended to expand our "Notes of Leading Cases" into fuller essays on those which deserve to be thus elaborately treated; and to follow, as far as possible, the mode of doing so adopted by the late John William Smith.

It is determined that, in order to give more authenticity and sanction to these treatises, they shall cease to be published anonymously.

We purpose to continue the "Short Notes," just as they were previously written, only that all the more important ones will fall into the former category, and those developing minor points only, form a second class.

As it usually happens, the first attempt at a new system is a partial execution of it. The common adversities of an editor, and the accidents of "unavoidable pressure of business," &c., have delayed more than one of the best of these essays till our next number. Unless valid objections reach us, we intend to make this a much more prominent feature in the work than this first experiment presents.—EDITOR.]

COMMON LAW.

GOODS IN THE ORDER AND DISPOSITION OF A BANKRUPT WITH CONSENT OF THE TRUE OWNER.

Healop v. Baker, 6 Exch. 820; and 20 Law Jour. Exch. 350.

By the 11th sec. of the 21 Jac. 1, c. 19 (the first statute creating reputed ownership), after reciting, "For that it often falls out that many persons, before they become bankrupts, do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose the same as their own; it is enacted, that if, at any time hereafter, any person or persons shall become bankrupts,

and at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition any goods and chattels whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition as owners; that in every such case, the said commissioners, or the greater part of them, shall have power to sell and dispose the same to and for the benefit of the creditors which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt."

The statute of which this section forms a part was repealed by the 6 Geo. 4, c. 16, and the substance of the above enactment retained by sec. 72 of this latter statute; which enacts, "That if any bankrupt, at the time he becomes bankrupt, shall by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors, under the commission." So far the new enactment not only adopted the principles, but almost the very words of the statute of James; except, indeed, that it left out the recital in that statute, and so left the new statute unfettered by any restriction which might be put upon the construction of the former statute, arising from that recital; but the statute of Geo. 4 has itself been repealed by the 12 & 13 Vic. c. 106, "The Bankrupt Law Consolidation Act, 1849;" and section 125 of that statute has taken the place of the 72nd section of the statute of George. That section enacts, "That if any bankrupt, at the time he becomes bankrupt, shall by the consent and permission of the true owner thereof have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposal as owner, the Court shall have power to order the same to be sold and disposed of, for the benefit of the creditors under the bankruptcy." This section is a *verbatim* copy of sec. 72 of 6 Geo. 4, c. 16, with one exception, that in that statute the expression is, "*the commissioners* shall have power to sell and dispose;" in the Bankrupt Law Consolidation Act, "*the Court* shall have power to order the same to be sold and disposed of." The alteration here made, although at first sight simple and immaterial, has given rise to much litigation, and has created considerable doubt and hesitation in the minds of the profession.

It is proposed to consider the cases which have been decided on this subject.

The first case on the subject is that of *Heslop v. Baker*, 6 Exchequer Reports, 820; 20 Law Jour. N. S. Exch. 350, which was an action of trover, brought by the plaintiff, who claimed certain goods and chattels, under an assignment made several years before the commencement of the suit, by one James Atkinson, as a security for alleged advances. The defendants were the assignees of Atkinson, who committed an act of bankruptcy by leaving his dwelling-house and place of business, and going to America, towards the end of August, 1850, up to which time the property had remained in his possession as reputed owner. On the 4th September, after the departure of the bankrupt, the plaintiff, who at that time knew of the act of bankruptcy, took possession of the property. On the 9th September Atkinson was adjudicated bankrupt; and, on the same day, the defendant Baker was appointed official assignee. On the 20th of the same month, the other defendants were appointed trade assignees; and on the 7th October, the defendants took possession of the property. On the trial before Mr. Justice Cresswell, at the Newcastle assizes, it was contended, on the part of the plaintiff, that under the Bankrupt Law Consolidation Act, property in the order and disposition of the bankrupt did not vest in the assignees, and that they could only deal with it by means of an order to be made under the 125th section. The learned judge told the jury to find a verdict for the defendants, if they thought the goods remained in the order and disposition of the bankrupt at the time of his bankruptcy, with the consent of the plaintiff, and that he knew of the act of bankruptcy before he took possession. The jury found for the defendants; and, in the Easter Term following, Bliss obtained a rule *nisi* for a new trial, on the ground of misdirection, against which Watson, Atherton, and Hugh Hill shewed cause on the 21st and 22nd June, 1851. The rule was made absolute for a new trial. The following is the judgment delivered by Mr. Baron Parke, taken from the Exchequer Reports.

“The question in this case depends entirely upon the construction of the Bankrupt Act, 12 & 13 Vic. c. 106, secs. 125-141. The section 141 provides for the vesting of all the bankrupt's personal estate in his assignees; and is as follows: ‘That when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed,

or come to him, Before he shall have obtained his certificate; and all debts due, or to be due to him, wheresover the same may be found or known; and the property, right, and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment.'

"If this were an entirely new statute upon a subject with respect to which no previous enactments had existed, there could not have been a question but that the bankrupt's own personal estate, present and future, would have vested in the assignees, upon his being adjudged a bankrupt, under sec. 141; but that goods in his order and disposition, under sec. 125; lands and goods previously transferred when the bankrupt was insolvent, under sec. 126; real or personal estate extended by a fraudulent extent, under sec. 127, would not pass by the adjudication; but an order of the Court would be required to sell or dispose of them, before any one else than the bankrupt could have any title in them. This is the construction that would be required by the plain unequivocal language of the statute. But it is contended on the part of the defendant, that the new Bankrupt Act is not to be construed as an entirely new Act, but as a consolidation of previous statutes, which are repealed and re-enacted; that the whole is to be construed with reference to the old law, and the re-enacted clauses understood in the same sense as they were before; and that, if so, the 141st section would give the adjudication the effect of passing, not only all the property which belonged to the bankrupt, but all of which he was in possession as reputed owner.

"We, however, think, after much consideration, my brother Platt still entertaining some doubt upon the point, that, construing this Act of Parliament with reference to the repealed enactments, it is impossible to give that effect to the 141st section in this Act.

"The state of the law before the passing of the Act 1 & 2 Wm. 4, c. 56, s. 25 (repealed and re-enacted by the new Bankrupt Act), as to the transfer of property from the bankrupt, was this:—

"By the statute 13 Eliz. c. 7, s. 1, the commissioners sold or assigned a portion of the bankrupt's estate to each creditor. By the 1 Jac. 1, c. 15, s. 5, they had the like power as to lands or goods conveyed without consideration by the bankrupt to his children, or otherwise. By the 21 Jac. 1, c. 19, s. 10, they had the same power where a bankrupt had his estate extended by another, under colour of that person being an accountant to the crown, that power to be exercised after

examination on oath; and by the 11th section they had the like power, without any such previous examination, over goods and chattels in his possession as reputed owner. By the 6 Anne, c. 22, s. 4, a temporary Act, general assignees were directed to be appointed for the benefit of the creditors; and the commissioners were to assign all the bankrupt's estate and effects to those persons only. After that Act expired, the 5 Geo. 2, c. 30, a perpetual Act, containing a similar provision (sec. 26), was passed; and afterwards that Act was repealed, and a like provision re-enacted by the 6 Geo. 4, c. 16, s. 63, extending in words, to all present and future personal estate of the bankrupt, which, by construction, the general assignment had been considered to do before; and by the 72nd section, the commissioners had power to sell and dispose of, for the benefit of the creditors, the goods and chattels in the bankrupt's reputed ownership; and a similar power, by sec. 73, as to lands or goods conveyed to his children or others, without consideration, with the additional limitation, that he should then be insolvent; and by sec. 71, after examination on oath, a similar power is given as to lands or goods fraudulently extended.

"As the law stood after that Act, there is no doubt that the commissioners could assign the goods and chattels in the possession and reputed ownership of the bankrupt, by virtue of the 72nd section; and the personal estate, mentioned in the 73rd, by one general assignment to the assignees; and none, that the former, at least, passed by an assignment, which 'ordered, disposed, bargained, sold, assigned, transferred, and set over, all the goods, chattels, and personal estate whatsoever and wheresoever, whereof the bankrupt was possessed, interested in, or entitled unto, at the time he became bankrupt, or at any time since.' This is the form given in 2 Deacon's Bankrupt Law, 195, ed. 1827; and 2 Cooke's Bankrupt Law, 63, ed. 1823; that given in 2 Cooke's Bankrupt Law, 53, as a form of a provisional assignment, contains only an assignment of the bankrupt's estate, the object of such an assignment being only to defeat an extent which would not apply to the goods of others in his reputed ownership. The difference probably arose from that cause.

"At a time prior, then, to the 1 & 2 Wm. 4, c. 56, s. 25, there is no question that the general assignment operated to vest in the assignees goods in the reputed ownership of the bankrupt; when that statute had passed, it is a question whether such goods did pass by the adjudication, by virtue of the 25th section. That section provides that, 'when any person hath been adjudged a bankrupt, all his personal estate

and effects, present and future' (not the personal estate, &c.), 'which by the laws now in force may be assigned by commissioners, acting in the execution of a commission against such bankrupt, shall become absolutely vested in, and transferred to, the assignees, by virtue of their appointment, without any deed of assignment, as if such estate were assigned by deed to such assignees and the survivor.' On the one hand, the language of the former part of the section appears to apply to the bankrupt's own property only; on the other, the words 'which by the laws now in force may be assigned by commissioners,' may give the former words a more extensive operation.

"In a note on this statute by Messrs. Roe and Millen, in their edition of Montagu and Ayrton's Bankrupt Law, vol. ii. p. 230, it is said, that neither the property mentioned in the 71st section, nor that in the 72nd section of the 6th Geo. 4, c. 16 (goods in the possession and reputed ownership), vests in the assignees by the adjudication. If it be so, no question could possibly arise in this case, for a similar construction would have to be made of the 141st section of the 12 & 13 Vict. c. 106; which would pass only the bankrupt's own personal estate, by its proper description of his personal estate and effects. But supposing it to be otherwise, and that by a liberal construction of the 1 & 2 Wm. 4, c. 56, s. 25, it ought to be held, that the words, 'his estate,' comprised all the estate which, by the laws then in force, might be assigned by the commissioners to the assignees; and, consequently, that the property in the reputed ownership of the bankrupt did vest, under that statute, it by no means follows, that it could pass under the 141st section of the new Bankrupt Act, even if it stood alone; for, in this section, we do not find the only words which might enable us to give a more extensive signification to the words, 'all his estate;' that is, the words, 'which by the laws now in force may be assigned by commissioners:' under which words, it may be supposed, that the legislature meant to comprise all that could be assigned—these words are omitted. And when we find in the same Act of Parliament, the 72nd section of the 6 Geo. 4, c. 16, is re-enacted, with this alteration only, that instead of the commissioners having power to sell and dispose of the same—that is, practically assign them to the assignees—the Court has power, not to sell and dispose of, but to order them to be sold and disposed of; we think that the meaning of these enactments in the new statute is, that in the case of the bankrupt's own property, it is to pass by the adjudication; but in the case of chattels in his reputed ownership, something different must be done, and the Court must

make an order to sell and dispose of the same, in order to vest the property in the assignees, or some other person.

"It was justly observed by Mr. Bliss, that there is a general heading to this 125th and the two following sections, 'With respect to the Power of the Court over certain Descriptions of Property;' in all of which a power to order and dispose of is given by express words. And, it may be added, that, as to the property mentioned in the 127th section, it is impossible it could pass by the adjudication; for the Court must first examine on oath, as to the debt due to the accountant, before they can make the order. Taking all these clauses together, and acting upon the sound and established rule of construing statutes and all written instruments, that is, according to the ordinary and grammatical sense of the words used, unless it would lead to some absurdity, or inconsistency with the intent of the framers, to be collected from the whole of the instrument and other legitimate grounds of construction, we, excepting my brother Platt, do not feel any doubt that the goods in question did not pass simply by the adjudication. There is no absurdity, or inconsistency, or inconvenience in holding that an order is necessary in such a case, when given; the title of the vendee if the goods are sold, of the assignees if the order is to vest the goods in them, will relate to the act of bankruptcy in the same way that the title of the assignees does by the general assignment; for all will be sold or assigned which the bankrupt had when he became bankrupt.

"Whether this state of the law arises from a mistake in the framer of the Act, or was intended, is a matter of mere conjecture. Possibly it may be a mistake in making these enactments in the terms used; but of the meaning of the terms used, there is, in the opinion of all of us, except my brother Platt, no doubt, and according to the words of the enactment, it is clear that the goods in question do not pass by the adjudication. If the Court makes the order to sell or vest in the assignees, a question may arise whether that will be final and conclusive, by virtue of prior sections; in cases where the claimant of the goods does not petition, under section 12, and consequently not to be questioned in a Court of Law, upon this point it is unnecessary to give any opinion. We think, therefore, that the rule must be absolute for a new trial; and if it became necessary, the defendants may tender a bill of exceptions, if they should think fit."

In consequence of this decision the assignees of Atkinson, who had previously sold the goods in question, applied to the commissioner (Ellison, of the Newcastle District Court of

Bankruptcy) for an order for the sale of these goods, for the purpose of giving validity by retrospection to the sale already made; and an order, dated the 9th December, 1851, was made, that the goods and chattels specified should be vested in the assignees, and the "Court certified and confirmed all acts theretofore done by the assignees in and about the seizure, sale, and disposition of the goods and chattels thereinbefore specified, so far as such seizure, sale, and disposition had been well and properly conducted; and ordered that the proceeds of such goods and chattels, so sold and disposed of, should be held and applied by the assignees for the benefit of the creditors of the bankrupt, under the bankruptcy." Heslop, the plaintiff in the action, appealed to the Lords Justices against this order (see *Ex parte Heslop re Atkinson*, 20 Law T. 28), on the ground that the Court of Bankruptcy could not, by a subsequent order, give the sale a retrospective validity; and that, if the true owner, without notice of the act of bankruptcy, take possession of the goods before the filing of a petition for adjudication, he could not be deprived of them by the operation of the 125th section of the Bankrupt Law Consolidation Act.

Lord Justice Knight Bruce, however, asked the counsel for the appellants if they wished the case to be argued upon the question of notice of the act of bankruptcy, and the time when possession was taken. They declined going into these questions; and their lordships, without calling on counsel for the respondents, dismissed the appeal, with costs.

A second trial was had in the case of *Heslop v. Baker*, 20 Law T. 191, subsequently to the order of Mr. Commissioner Ellison, which terminated again in a verdict for the defendants. A rule *nisi* for a new trial was subsequently obtained; and on the motion to show cause, the following points were raised in support of the rule: 1st, Whether, the plaintiff having after the act of bankruptcy taken possession of his own goods then in the possession of the bankrupt, the subsequent order of the Court vested them in the assignees, from the date of the act of bankruptcy, so as to deprive the real owner of them? 2nd, Whether the order of the Court was not bad on the face of it, as it claimed that the plaintiff was the true owner? and 3rd, Whether the plea of "not possessed" was properly proved? The rule was discharged.

Pollock, C. B., said, in giving judgment,—

"It appears to me the order in question is perfectly good; and, indeed, the objection taken to it was purely technical. As to the relation from the time when the order was made back to the date of the act of bankruptcy, I think the Court was perfectly correct in the

opinion expressed in this case on the former occasion. The effect of it therefore is, that the Court has the power to make the order in respect of goods in the possession of the bankrupt at the time he became bankrupt. I think, therefore, the better course is to adhere to the judgment, which I think is quite correct, given in this court in this case not long since, and to hold that, the goods in question being in the possession of the bankrupt at the time he became bankrupt, by the consent and permission of the true owner thereof, whereof the bankrupt was reputed owner, the Court had power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. Having made such an order, it related to the date of the act of bankruptcy."

Parke, B., said :—

"The 21 Jac. 1, c. 19, s. 11, is the same as the 12 & 13 Vict. c. 106, s. 125, except that the words 'the court' are substituted for the word 'commissioner.' No act by the reputed owner, subsequent to and with knowledge of the act of bankruptcy, could defeat the order of the Court, or of its having its full operation and effect from the date of the act of bankruptcy. There must be the same decision here as there was in the cases under the statute of 21 Jac. 1, when the commissioner made the order. There is no protection given by any of the other sections in the late Bankrupt Act, and the assignees became, therefore, entitled to claim the goods, by virtue of the order from the date of the act of bankruptcy; the terms of the 141st and 125th sections are to be construed in precisely the same way as they were under the statute of James. Then the criticisms which were made upon the order were invalid; the order is effectual to pass the property, and that is sufficient."

So far these cases decide, that an order of the Court of Bankruptcy for the sale of goods and chattels in the reputed ownership of a bankrupt, is necessary to vest them in the assignees, and that such order, whenever made, relates back to the act of bankruptcy, and can therefore be made at any time. But another question has arisen, to which the doubt thrown out by Mr. Baron Parke, in his judgment in *Heslop v. Baker*, 6 Exch. has added weight;—whether the order of the Commissioner in Bankruptcy is to be final and conclusive, and not to be questioned in a court of law; and this again involves another point, namely, whether the order is to be made *ex parte*, or upon notice to the real owner of the goods and chattels claimed by the assignees. The questions have created much discussion, and no little alarm,—the suggestion naturally occurring, that should the affirmative upon the first of these questions be decided upon, an entirely new method of procedure will have to be followed, and a question, which of all others is most fitting to be decided by a jury, will be withdrawn from their cognizance, and adjudi-

cated upon by a single judge. The following cases, bearing upon this point, have been decided :—

The first is that of *Ex parte* Barlow, *re* Marigold, before the Lords Justices, reported in 22 Law J., N.S., Bankruptcy, 15 (see also note to *Quartermaine v. Bittleston*, 20 Law T. 236), and was an appeal from the refusal of Mr. Commissioner Daniel to make an order for the sale of the stock in trade and effects of the bankrupt, which the assignees claimed as having been in the reputed ownership of the bankrupt at the time of his bankruptcy. The commissioner had declined to make the order *ex parte*, and required the mortgagee to be served, which having been done, the application was renewed.

It appeared that the mortgagee, who claimed the goods under a bill of sale, had permitted the bankrupt to retain possession for a time, but before the date of the adjudication he had entered and taken possession, and had actually sold the goods. The mortgagee appeared on the renewed application, and, as was now alleged by the assignees, submitted to the jurisdiction. This was, however, disputed. The commissioner still declined to make any order, on the ground that, as the mortgagee had actually sold, there was in truth nothing for the order, if made, to operate upon. On this refusal the appeal was presented. On behalf of the mortgagee, it was contended, that if the order were made in a proceeding to which he were a party, it would conclude not only the question as to the propriety of making an order, but also the question of the goods being in the bankrupt's reputed ownership,—a question which he had in nowise submitted to the judgment of the commissioner.

Lord Justice Knight Bruce said :—

“ If this order for sale be made in the presence of the mortgagee, it will have the effect of prejudicing him in any proceedings which may at law be taken by or against him, and therefore it appears to me to be the proper course that we should dismiss the appeal as against him, and that the order, if made, should be made *ex parte*. Indeed, it seems to me that it would be better for the commissioner, on an application to him, to make the order *ex parte*; and probably that learned functionary will feel no hesitation in doing so, upon being apprised of the intimation of opinion we have given.”

Lord Justice Lord Cranworth :—

“ In this case, I am of opinion that the mortgagee ought not to have been served at all; and that the proper course for the assignees to have taken would have been to appeal at once from the refusal of the commissioner to make an order *ex parte*. I agree with my learned brother, that the proper course for us to pursue is to dismiss the appeal as against the respondents, the mortgagee, with costs,

but without prejudice to any question ; and then the appellants may take an order on an *ex parte* application. But, probably, to avoid all question, it will be better to apply again to the commissioner, to make the order *ex parte*, and he will, I think, with this intimation of our opinion, take that course."

The last case on this point is *Quartermaine and others v. Bittleston* and another, which was an action of trover brought by the plaintiffs, who were trustees for the children of the late Mrs. Cuff against the assignees of E. G. Cuff, formerly the landlord of the Bell Hotel, Leicester, a bankrupt, to recover certain goods remaining on the premises of the Bell Hotel at the time of his bankruptcy. The commissioner had made an *ex parte* order in the following terms :—

"It is hereby ordered, that all the goods and chattels which at the time the said E. G. Cuff became bankrupt were, by the consent and permission of the true owner thereof, in the possession, order, or disposition of the said E. G. Cuff, whereof the said E. G. Cuff was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, shall be forthwith sold and disposed of by the assignees of the estate and effects of the said E. G. Cuff, for the benefit of the creditors under the bankruptcy."

The objections made against this order were, that it was made *ex parte*, that it was too general, and that it did not specify who were the owners of the goods. Judgment was given for the plaintiffs, on the ground that the order was too general, and it was not therefore necessary to decide the other questions. The inclination of the Court was, however, in favour of the order being made *ex parte*, and also that it would not in all cases be necessary to specify the owners of the goods, though the goods themselves must be specified.

Jervis, C. J., in giving judgment, said :—

"I think, without particularising what ought to be specified in the order, that a mere general order to sell and dispose of all property of which the bankrupt may have been in possession, or of which he has had the possession, with the consent of the true owner, at the time of the act of bankruptcy, does not satisfy the requisites of the statutes ; and I think, in accordance with the decision of the Lords Justices, that an *ex parte* order is sufficient for the purpose."

But at all events, the order which is to be made in respect of the goods of which the bankrupt is in possession as reputed owner, with the consent of the true owner, must be specified.

After referring to the words of the 125th section, his Lordship said :—

"It is unnecessary to inquire whether these words were inserted by design or accident, or negligence and inadvertence ; I do not know

how that is; those who have anything to do with framing an Act of Parliament are, of all others, the worst persons to put a construction on it. We must take it as it is in the enactment. If they were inserted by design, there is much to be said in favour of their introduction; because, if you recollect, the goods are to be taken as goods that are, by admission, the property of another person; and it is not unfair to suppose, that at least a *prima facie* case should be made before the commissioner before the real owner of the goods be put to litigation to test the right of property. There is much to be said (and possibly, by accident, a great good may have been done) in favour of the beneficial amendment of the law of bankruptcy by these words. The words being there, we are bound to put a construction on them; and taking them in connection with the case of *Healop v. Baker*, the order does not satisfy the provisions of the Act, and the plaintiffs are entitled to our judgment."

Maule, J., said :—

"It appears that the provisions of this Act of Parliament vary from the provisions of former Acts. In effect (though it might have been doubtful at first,—and we doubted it), the provisions in the former Acts vested at once, without anything more, in the assignees, all property of which the bankrupt was reputed owner, or had or took upon himself the order and disposition. In those cases the former Acts vested at once the property in the assignees, from the time of the act of bankruptcy, as much as if the property had been the property of the bankrupt. Now, certainly, that was a provision in the Act of Parliament in which the interests of a bankrupt's creditor appear to have been more considered than those of the true owner. That was natural enough in those who were distributing the property of the bankrupt, and whose main object it was to cause a distribution of all property that ought to be distributed among the creditors of the bankrupt. Now there was danger under that, that property which ought not to be distributed might come to be distributed; and though that might not happen often, yet there was danger that the true owner might suffer considerable vexation if that state of things were allowed to exist; and when the assignees seized goods that belonged to a third person, that third person had no means of knowing whether they claimed them as the bankrupt's, in all time and independent of the bankruptcy, or whether they claimed them as being subject to the same distribution as the bankrupt's property, and therefore vested in the assignees by virtue of the reputed ownership. There was nothing to give the true owner any notice or warning, as to whether it would be set up or not; and, indeed, it very constantly happened that the question was, whether a certain property was that of a person who was the true owner of it. The assignees would make a case, in which they would say, 'This is the property of the bankrupt; or if not, at any rate it was in his possession before the bankruptcy, and it came into the possession of the assignees as if the bankrupt was the true owner.' Now, de-

prising a man of his undoubted property under these circumstances was a very harsh measure, as far as he was concerned, and more particularly as it was put and considered as a sort of delinquency on his part, namely, as enabling a bankrupt to obtain false credit, by passing for the owner of the goods of which he was not the owner; so that in that state of things the assignees might, at their election, seize the property, and take on themselves the whole responsibility of proving it was in the reputed ownership of the bankrupt, with the consent of the true owner, without any control over it. Now the object of this section, I think, is, that they shall not do that, unless they are in a condition to make (it means not only to a jury, but to a competent Court) such a *prima facie* case, that such a Court can see they have authority over the case in which those goods had been seized. In order to that purpose being effectuated, it shall be considered what sort of order there ought to be. Now I observe the order is something like, and has some sort of analogy to, the finding of a bill by a grand jury, that, before a person's liberty be affected, or he shall be tried for a supposed offence, a *prima facie* case must be made to a competent tribunal to show that he is a person in respect of whom a case exists that is fit to be tried by a jury. Now I think it is a similar function that is intended to be conferred upon the Court of Bankruptcy; and that, in order duly to execute that, you must go beyond showing simply what is suggested ingeniously by the learned counsel, when I object to the order, supposing it to be an order in this form, namely, to take all the goods that were in the order and disposition of the bankrupt at the time of the bankruptcy, which would be quite inoperative. He said, it might just as well have left that to the assignees (or nearly as well) without showing anything more than such an order; but it was answered thus: 'Still there would be something to inquire into, whether there were assets arising out of the actual property of the bankrupt, whether or not sufficient to pay all his debts in full. This is a rare state of things, though not an impossible one. I do not think the Legislature would have taken the trouble to enact a new mode of dealing with such a contingency as that; but I think the true object of the Act would effectuate that, that the commissioner of the Court of Bankruptcy ought to have an opportunity (*ex parte*, indeed, as held by the Lords Justices, but still to have an opportunity) of deciding on all the matters which the assignees would have to prove before a jury, in order to entitle them to take away the property from the person whose property it is. It seems to me not unreasonable, and seems to be gathered from the Act of Parliament, particularly with reference to what had gone before in the way of legislation, that the Court ought to inquire into as to all that a jury would have to inquire into on trial, or that you are in the habit of inquiring into before certain functionaries; and if the assignees are not in a situation to make (in the absence of any opposition before the Court of Bankruptcy, or if they should dismiss their application before a court of appeal) a case for taking away certain goods, I think they ought not to be allowed to try the ques-

tion before a jury. Now I do not think this order comes within the scope and intention of the Act; I do not think this order is sufficient if the matter was tried before a jury; particular goods must necessarily be the subject of the trial. Upon a trial before a common jury, they would have the power, and must necessarily inquire into the question, whether certain particular goods were in the order and disposition of the bankrupt, with the consent of the true owner. Now this order does not apply to any particular goods, and it does not mention any particular owner; and I do not say it would be necessary absolutely in all cases, that the goods of any particular owner must be specified, but it should be so worded as to what goods they are that in the Court of Bankruptcy ought to be dealt with by the assignees, and disposed of by them as bankrupt's property, in respect of reputed ownership: the order does not do that unless it does specify the things or the goods intended to be taken. Now this entirely remits that to the assignees, to determine on their own inquiry, upon grounds not laid before the commissioners; or whether it had been laid before them or not, leaves it to the assignees to seize any goods belonging to any person, whether or not they have been at all mentioned or put in question before the Court of Bankruptcy; therefore I think it does not give to the true owner of the goods the benefits the Act of Parliament intended to give. One advantage would be this: that the true owner might always, by inspecting the proceedings in bankruptcy, or by proper means, see whether any such order had been made; he would have had some notice of the way in which his goods were sought to be taken away from him, whether as being in the order and disposition of the bankrupt, or in respect of their belonging to the bankrupt himself; and it would give notice and information on the subject, and he would have a remedy which he is intended to have. I therefore think that the plaintiff is entitled to the judgment."

Thus far, the cases decided upon the 125th section of the Bankruptcy Law Consolidation Act lay down the following principles:—

1st. That an order of the Court of Bankruptcy (which by section 6 of that Act is constituted by a single commissioner) to sell is necessary to transfer the legal title of the goods in the order and disposition of the bankrupt, as reputed owner, to the assignees of the bankrupt.

2ndly. That such order when made relates back to the act of bankruptcy, and therefore, and though subsequent to a sale of the goods, is still binding upon them; and,

3rdly. That the order should specify the goods to be sold, though it may not be always necessary to state who is the actual owner.

4thly. That such an order should be made upon the *ex parte* application of the assignees, thus leaving the rights of three

parties unaffected. This point may, perhaps, still be considered as open to controversy. The case *Ex parte Barlow, re Marygold* being the only one in which it came directly before the Court, the judgment there given may be considered as more an expression of an opinion than a judicial decision; and the expression of the judges in *Quartermaine v. Bittleston* being, though very strong, only *obiter dicta*. But there is no doubt, from what fell from the Lord Justices in *Ex parte Barlow*, that if that case or any other involving the same question came before them again, they would decide that the order should be made *ex parte*, and thus this point for all practical matters may be considered as settled. But another question has arisen, which we believe has given rise to much doubt and hesitation, namely, upon what amount of evidence and in what manner should this order be made? Previous to the case of *Ex parte Barlow*, and *Quartermaine v. Bittleston*, it appears, from a statement made by counsel in the latter case, that it was the practice in London to make the orders on petition, with notice to all parties interested, and various and conflicting opinions have been held by different learned commissioners, though the general feeling had been (owing to the question raised by the judgment in *Heslop v. Baker*, in 6 Exch. Rep. whether the order would be final and conclusive, by virtue of prior sections, in cases where the claimant of the goods does not petition under section 12, and is consequently not to be questioned in a court of law), that notice should be given to all parties interested, and they should be allowed a hearing on the merits. This may now be considered as set at rest by the cases lastly above mentioned, but though the order should now be made *ex parte*, the exact duty devolving on the commissioners in making the order does not seem so clear, and we fear much discussion may still arise before this point is finally settled.

To decide this question the law, as it stood before the Bankrupt Law Consolidation Act, should be carefully kept in view. What were the obligations of the commissioners under that law? Previous to and when the statute of 21 Jac. 1 was passed, no assignees were chosen, and the commissioners therefore acted generally in the disposal of the bankrupt's property by virtue of the Acts then in force, and the commission granted by the Lord Chancellor (see the statutes 34 & 35 Henry 8, c. 4; 13 Eliz. c. 7; & 1 Jac. 1, c. 15). The statute 5 Anne, c. 22, was the first Act which provided for assignees being chosen by the creditors. There was no Court of Bankruptcy until the 1 & 2 Wm. 4, c. 56. This being the case, the 6 Geo. 4, c. 16, s. 63, directs the commissioners to assign to the assignees all the present and

future personal estate of a bankrupt, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him before he shall have obtained his certificate, and all debts due or to be due to the bankrupt. Then, by section 64, they are to convey his real estate to the assignees; but goods in the order and disposition of the bankrupt as reputed owner are not included in this section. With respect to these, by section 72, the commissioners shall have power to sell and dispose of them for the benefit of the creditors under the commission. It will be seen that the Act makes a marked difference between the actual property of the bankrupt and the goods in his order and disposition as reputed owner with the consent of the true owner, the first being absolutely assigned by the assignees, whilst the latter are only subject to a power in the commissioners to sell and dispose of them. Why was this distinction drawn, if it were not that the Legislature meant to throw upon the commissioners a duty in cases where the *property of third parties* was affected by a bankruptcy, to satisfy themselves that a good case was made to warrant them in dealing with such property, which but for the Bankrupt Law would undoubtedly belong to others. This object, if, as we submit, this be the true construction of the statute of 6 Geo. 4, was obviated by the practice of the commissioners, who made "one general assignment of all the goods, chattels, and personal estate, whatsoever and wheresoever, whereof the bankrupt was *possessed*, interested, or entitled unto at the time he became bankrupt, or at any time since."

Mr. Baron Parke, in delivering the judgment of the Court in *Heslop v. Baker*, stated that there was no doubt that the commissioners could assign the goods and chattels in the reputed ownership of the bankrupt, by virtue of the 72nd section, by one general assignment, to the assignees, and none that they passed by an assignment in the words above mentioned. This may be so, and yet the Legislature may not have intended these goods to have been so summarily disposed of. Their real intention having been overlooked from the commencement of the Act, every subsequent instance only confirmed the rule; and it may be a question whether, after the rule had been thoroughly confirmed by practice, it would have been overturned had an objection been subsequently taken. But why, if this be so, give the commissioners the power by a distinct section? If a general assignment passed not only the bankrupt's own personal estate, but goods in his order and disposition, why not include the latter species of property in the 63rd section, and why give them only a power to sell instead of a general direction to assign to the

assignees? We must confess we can see no reason for this distinction, unless it be found in that which we have above advanced.

This brings us to the Bankrupt Law Consolidation Act, 1849, which repeals the whole of the 6 Geo. 4, c. 16, previous to which a Court of Bankruptcy had been constituted in London by the 1 Wm. 4, c. 56, and country district courts by the 5 & 6 Vict. c. 122. But the jurisdiction of the commissioners was very limited, the primary Court for most purposes being the Court of Review, or, as subsequently altered, the Vice-Chancellor sitting in bankruptcy.

The Consolidation Act, however, made a great and important change in the constitution of the Court. Section 6 enacts, "That the Court of Bankruptcy shall continue to be a Court of Law and Equity for the purposes of the Act, and shall continue to be a Court of Record; and each and every of the commissioners for the time being, acting in London and in the several districts in the country, shall singly and simultaneously, or otherwise, as occasion may require, be and form the Court for every purpose under this Act, or in execution of any duty which may hereafter be imposed on the Court, except where otherwise in the Act specially provided." By section 12, the Court, in the exercise of its primary jurisdiction, shall have superintendence and control in all matters of bankruptcy, subject to appeal to the Vice-Chancellor sitting in bankruptcy (now the Lords Justices). Thus it will be seen that each commissioner is constituted a Court of Law and Equity and Record, having primary jurisdiction in all matters of bankruptcy. In other words, the whole primary jurisdiction of the Court of Review is transferred to each commissioner, and the Lords Justices have only an appellate jurisdiction (see *re Cheetham*, 21 Law Jour., N. S., Bankruptcy, 5). Now let us turn to the 125th section of the Act. It is word for word the same as the 72nd section of 6 Geo. 4, c. 16, except that the Consolidation Act substitutes the words, "*The Court shall have power to order the same (that is, the goods in the order and disposition of the bankrupt) to be sold and disposed of for the benefit of the creditors under the bankruptcy,*" for these words in the repealed statute, "*The commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission.*" We are quite aware that great complaints have been made of the careless manner in which the Consolidation Act has been framed, and the numerous apparent blunders which lie so thickly through its clauses; but we cannot think so poorly of our Legislature as to believe that they would actually copy a section out of another Act of Parliament *verbatim* except three

or four words, and deliberately alter these words without an express object in so doing. And the object seems evident enough. The first alteration is the word "court" for "the commissioners." If we look through the Act, we shall find the word "court" is always used when any act is to be performed in the exercise of its jurisdiction. When the commissioners are referred to, as such, it is only in those clauses which do not refer to their jurisdiction as a Court. Therefore, the substitution of the word "court" for "commissioner," is no more than was necessary to meet the altered position the commissioners were placed in by being constituted a "*court*." Then, what was the duty of a court? Clearly not to sell property, but to decide questions and make orders. The assignees may sell, but the *Court* must order a sale. The commissioners, under 6 Geo. 4, c. 16, were not a court, and they exercised, for most purposes, a merely ministerial power, they therefore were empowered to *sell*; but when the section then empowering them was transferred into the Consolidation Act, the Legislature, accommodating their language to the altered position of the commissioners, at the same time that they retained every word in the section which was consistent with the new state of things, enabled the Court to order goods in the order and disposition of the bankrupt to be sold. This was very probably the sole reason for the insertion of those words which have caused so much discussion and litigation, and it may be argued, that such being the case, the old practice was not intended to be interfered with beyond what was absolutely necessary to meet the altered state of affairs, and that if the commissioners used formerly to assign these particular goods to the assignees without inquiry, so may the Court now make the order also without inquiry. But it is worthy of remark, that although Mr. Baron Parke, in *Heslop v. Baker*, observed, that under a general assignment from the commissioners, under the 6 Geo. 4, goods in the order and disposition of the bankrupt would pass, yet in *Quartermaine v. Bittleston*, the Court of Queen's Bench expressly decided, that a general order not specifying the goods would not be sufficient under the Consolidation Act. It is also worthy of remark, that the 1 & 2 Wm. 4, c. 56, says nothing respecting this particular species of goods; but, by the 25th section, vests in the commissioner all the personal estate, present and future, "which by the laws now in force may be assigned by commissioners acting in the execution of a commission against a bankrupt," without the necessity of a deed of assignment. No question has been raised as to whether goods in the order and disposition of a bankrupt vested in his assignees under this section, previous to

the passing of the Consolidation Act, but it will be seen that Mr. Baron Parke, in the last-mentioned case, seems to consider it doubtful whether they did so pass. The most natural view to be taken of the question at this time then, appears to be, that the Legislature, in framing the 125th section of the Consolidation Act, intended to impose upon the Court that duty, with respect to these goods, which we have before submitted they intended to impose on the commissioners, under the 6 Geo. 4, but which was rendered nugatory by the practice then adopted, and it will follow, that in making orders under the 125th section, the Court will require a good *prima facie* case to be made out, sufficient to satisfy them (at least as fully as an *ex parte* case can do) that the goods and chattels to be affected were really in the order and disposition of the bankrupt at the time of the bankruptcy, *with the consent of the true owner*. The observations of Mr. Justice Maule, in *Quartermaine v. Bittleston*, *ante*, strongly bear out this view of the case. He likens the functions to be exercised by the Court of Bankruptcy to the finding of a bill by a Grand Jury,—and certainly the analogy is very striking; for, as the law will not put a man to the annoyance, vexation, and expense of answering a criminal indictment, until it shall have been decided by the Grand Jury that, at least, a good *prima facie* case is made out to warrant the charge; so the Bankrupt Law will not put a man who it admits is, but for the special operation of that law, the true owner of goods and chattels, to the annoyance, vexation, and expense of a trial, the effect of which may be to deprive him of those goods and chattels, unless the Court is satisfied that at least a good *prima facie* case is made out so to deprive him, and to stigmatize him with the charge of having assisted the bankrupt in committing a fraud upon his creditors. If this view be adopted throughout the different Bankruptcy Courts in London and the country, it will establish a wholesome check on reckless litigation, and be productive of much advantage to bankrupts' estates and "real owners."

C. H. COMPTON.

BILL OF EXCHANGE GIVEN FOR AND ON ACCOUNT OF A DEBT.

Belshaw v. Bush, 22 Law J. (N. S.) C. P. 24.

THIS was an action of debt for 40*l.*; second plea (as to 33*l.* 10*s.* parcel of the debts in the declaration mentioned, and the causes of action in respect thereof), that after the accruing of the

causes of action in the declaration mentioned, and before the commencement of this suit, the plaintiff made his bill of exchange in writing, and directed it to William Bush, the father of the defendant, and thereby required the said William Bush to pay to the order of the plaintiff 33*l.* 10*s.* for value received, three months after date. That William Bush then accepted the said bill, and delivered it, so accepted, to the plaintiff, for and on account of the said sum of 33*l.* 10*s.*, parcel of the said debts, in the declaration mentioned, and the causes of action in respect thereof. And the plaintiff then received and took the said bill from William Bush, for and on such account as aforesaid. That afterwards the plaintiff endorsed and delivered the said bill to W. F. Gray, who then became, and was before and at the time of the commencement of this suit, the holder thereof, and entitled to sue William Bush thereon.

Replication—That the said bill of exchange, in the second plea mentioned, had become and was overdue and unpaid before the commencement of this suit, to wit, on, &c., and that no part of the same money therein mentioned hath ever been paid.

General demurrer and joinder.

Judgment—That the plea afforded a good answer to the action.

From the judgment in the above case we gather the following rules :—

1. That a right of action once gone is gone for ever.
2. That a covenant not to sue for a limited time (without a forfeiture for suing), is not a suspension of a right of action.
3. That the giving of a negotiable instrument for and on account of a debt, suspends the right of action so long as such instrument be running or outstanding; but is an exception to the above rule, that a right of action once gone is gone for ever.
4. That a negotiable instrument so given by a stranger and adopted by the debtor, has the same effect as if given by the debtor.

The first of these rules, "that a right of action once gone is gone for ever," has been so long, and is so fully established, that it needs but little of comment.

Its most general application is in the cases, 1st, of the debtor becoming the executor of the creditor; 2ndly, of the marriage of the debtor and creditor; 3rdly, of the party primarily liable on a negotiable instrument becoming the holder of it after it is due: in all which cases the rule arises in this, that the person

to sue and be sued is the same, and as during the time that such is the case no action can be brought, the right is gone for ever.

The release, in law, on account of the debtor becoming the executor of the creditor was fully recognised as far back as 8 Edw. 4, Year-book, 3; 20 Edw. 4, c. 17; and in 21 Edw. 4, a conversation on the subject takes place between Copley, prothonotary, and Brian, C. J.; the translation of which is, "Note that Copley (prothonotary) asked of Brian, C. J., if three be bound to a man in an obligation jointly and severally, and the obligee make one of the obligors his executor, and die, whether he who is made executor shall have an action against any of the others; and Brian said he should not, for if one was discharged all shall be discharged; because the making one of them executor is as perfect a discharge in law, as if he had released to one in deed. Copley,—Sir, the obligation is several. Brian,—This does not matter; for a recovery against one of them, and execution sued, will be a discharge to the others." In the case of *Dorchester v. Webb*, Sir W. Jones, 345, it was resolved, "Si obligee fist le obligor executor, que agrée a ces la, le dett est discharge sur le rule, de actions personal un foits suspend per act le party, il est ale a tous jours." Lord Coke has it, "If the obligor make the obligee his executor, this is a release in law of the action, but the dutie remains, for the which the executor may retaine so much goods of the testator" (Co. Litt. 264, b.); and, of course, the release must more strongly exist, if the obligee make the obligor his executor. See also Com. Dig. "Release" (A 2), and "Adm." (B 5); *Wankford v. Wankford*, 1 Salk. 299; *Cheetham v. Ward*, 1 B. & P. 650.

The words "release in law," must be construed strictly; for the executorship of the debtor scarcely amounts to an absolute release. The circumstance of the creditor making the debtor his executor, must be regarded as a legacy of the debt, and like other legacies it is not to be paid, or rather retained, until the debts owed by the testator are satisfied; and, therefore, if the assets were not sufficient to satisfy the creditors, the executor would have to bring the amount of his debt into the estate in order to discharge the liability of his testator; and this liability existing, it can scarcely be said that the debt is released. *Wankford v. Wankford*, 1 Salk. 299; *Berry v. Usher*, 11 Vesey, 87, and cases there cited *in notâ* (39).

In order that the debt should be released, it is not necessary that the executor should administer (*Wankford v. Wankford*); but whether an actual refusal to accept the executorship will prevent the release from taking effect was once, at least, a point

of some nicety. Mr. Butler, in Hargrave and Butler's edition of Coke upon Littleton, 264 b, note 1, says the debt is discharged, whether the executor accepts or refuses the executorship; but in the edition of 1832, this note is not inserted. This doctrine is supported by the opinion of Twysden, J., in *Abram v. Cunningham*, 1 Vent. 303; but in the case of *Wankford v. Wankford*, 1 Salk. 299, three of the judges held the contrary; the fourth, Powell, J., giving no opinion on the subject. Holt, C. J., made this distinction, that where the obligor is appointed sole executor to his obligee, and refuses the executorship, there the debt is not discharged; but where he is appointed executor with others, and refuses, if his co-executors act, the debt is released; and gives as a reason for this, that, in the latter case, the refusal to act is void, for even after the refusal the executor may come in and act, citing in support of this, Lord Petre's case, 1 Salk. 811, where the common lawyers and civilians differed, the former saying that if there are several executors and one renounces, and the rest prove the will, by the common law, he who renounces may, at any time afterwards, come in and administer, and though he never act during the life of his co-executors, may, after their death, come in and take on him the execution, and shall be preferred before any executor of his companions. But the civilians held, that by the civil law, a renunciation is peremptory. Dyer, 160, is contrary to the opinion of the common lawyers, but it is supported by the Year-book, 21 Edw. 4, 23; *Parblett v. Freeke*, Hard. 111; see also *Arnold v. Blencorn*, 1 Cox, 426. And certainly Lord Holt's judgment is supported by Hensloe's case, 9 Coke, 36 b, where—

“The Court took this difference,—when many are named executors, and some of them refuse, and some of them prove the will, those who refuse may afterwards at their pleasure administer, notwithstanding the refusal before the ordinary; but if all refuse before the ordinary, and the ordinary commits administration to another, then they cannot afterwards administer; and this difference is proved by our books, in 21 Edw. 4, 24 a, where it is resolved by the justices, that if twenty are named executors, and one proves the will, it sufficeth for them all, and the refusal before the ordinary is not any estoppel against them to administer after, when they please, in our law, and we have no regard in this point to the law of the Church.”

It seems, therefore, that if a debtor be appointed as sole executor, and he refuses to act, the debt would not be released; but if he were so appointed jointly, and renounced so long as he could, if he would come in and act, no action could be maintained against him by the other executors in respect of the

debt due to his testator; and it is shown to be so by the fact that if it were otherwise he, as defendant, would, under such circumstances, be entitled to plead the non-joinder of himself as plaintiff, which of course cannot be. See *dicta* in *Venables v. The East India Company*, 18 Law J. (N. S.) Exch. 266; also, *Cummins v. Cummins*, 3 Jones & Lat. 91 (Irish Rep.).

The marriage of a creditor with a debtor has also long since been held to amount to a release in law (8 Edw. 4, 3). "If," says Lord Coke, "the *feme* obligee take the obligor to husband, this is a release in law" (Co. Litt. 264 b). Cases have arisen where the cause of action did not accrue until after the termination of the marriage, and there, of course, the marriage caused no release. In *Smith & Uxor v. Stafford*, Hob. 216, the husband promised the wife before marriage that he would leave her worth 100*l*. The question arose, whether the wife had a good cause of action by reason of the non-performance of the contract; and all the judges but Hobart were of opinion, that as so long as the marriage continued, no cause of action could arise, the marriage could not be a release of that which never existed. A somewhat similar point arose in the case of *Gray v. Acton*, 1 Salk. 325; S. C. 12 Mod. 290; there the husband had executed a bond to the wife before marriage, conditioned to be void if she survived him, and he left her 1,000*l*. Two of the judges thought that she could sue on the bond after the husband's death, regarding the debt as not existing during the husband's life; but Lord Holt differed from this opinion. He admitted that a covenant or promise by the husband to the wife to leave her a sum of money in case she survives him is good, because it is only a future debt on a contingency which cannot happen during the marriage; but that this bond-debt was a present debt; that the condition was not precedent, but subsequent; that the bond caused a present duty, and, consequently, that the marriage was a release of it. And this opinion seems to have been afterwards supported by a decree made in the same case in Chancery (2 Vern. 481; see, also, *Carmel v. Buckle*, 2 P. W. 243), and doubtless is good law.

The case of *Richards v. Richards*, 2 B. & Ad. 447, seems to establish a distinction between causes of action existing before and those created during marriage. In that case Martha Richards, the plaintiff, was the payee of a joint and several promissory note made by Thomas Richards, William Richards, and another; the consideration for the note was money belonging to an estate of which the plaintiff was administratrix (but this does not seem to have been raised in the argument or judgment). At the time of the note being made, Thomas Richards and the

plaintiff were married; he died, and this action was brought after his death against William Richards, and the Court of Q. B. held that the plaintiff had a good cause of action. This case was soon afterwards followed by *Rose v. Poulton*, Exor. 2 B. & Ad. 822. There three persons, of whom the defendant's testator and A. B. were two, covenanted with four persons, of whom the plaintiffs and the same A. B. were three; after the death of A. B., an action was brought on the covenant by the plaintiffs against the defendants, and the point was raised that A. B. was at one time entitled to sue and liable to be sued in respect of this cause of action; but the Court held, that the death of A. B. removed the objection on the ground of contribution, and that the action well lay.

These decisions seem somewhat at variance with the principles that a person cannot sue and be sued in the same action, and that a cause of action once gone is gone for ever; for if the plaintiff in the case of *Richards v. Richards* had sought to enforce her right of action during the lifetime of her husband, she must have joined him as plaintiff, and he would also have been liable on their joint promise as co-defendant, and on the several by way of contribution; and similar would have been the circumstances in *Rose v. Poulton*. During the lifetime, therefore, of the husband in the one case, and A. B. in the other, no action could have been brought, and the right once gone is gone for ever. It must be remarked, that nothing was done in either of those cases to create a suspension or release of the cause of action, for the disability to sue existed from the creation of the promises, and no right of action existed on them until a certain event took place. Looking, then, at the intention of the parties, it may be said that they would not go through the form of making a promise unless it were intended to have effect (see *dicta* in *Ford v. Beeck*, 17 Law J. Q. B. 114—118); that although no effect could be given to the promise until a certain disability to sue was removed, yet when it was removed the promise should be enforced. Probably, then, the distinction will be found to be in this, that where a right of action once exists, and then by the act of the parties is suspended, that it is gone for ever; but where the right never has been such that it can be enforced, as soon as that which prevents it from being enforced is removed, then it shall be regarded as having existed for the first time, never having been suspended, and may well be sued upon.

The satisfaction of a negotiable instrument by the party primarily liable upon it becoming the holder of it has been fully discussed and considered in the late case of *Harmer* and others

(in error) *v. Steele*, 19 Law J. (N. S.) Exch. 34; S. C. 4 Exch. Rep. 1. That action was brought by the indorsee of a bill of exchange, drawn by one Wood, against the defendants (plaintiffs in error) as acceptors. The 10th plea set up as a defence, that after the accepting of the bill by the defendants, and before it became due, it was delivered to Wood; and that after it was so accepted and delivered, and while Wood was the holder and payee thereof, and before it became due, Wood indorsed the bill to Harmer, one of the defendants (acceptors), with the intention of divesting himself, and whereby he did divest himself of all right in and to the said bill, and of the right of suing therein, and of indorsing the same; that the bill was indorsed to the defendant Harmer for valuable consideration; that Harmer continued to be the holder of the bill from the time when it was so indorsed, until it was delivered by Harmer to the plaintiff, and that the indorsement in the declaration mentioned consisted merely of the last-mentioned delivery of the bill by Harmer to the plaintiff, and that it was never indorsed by Wood otherwise than as in the plea mentioned; and that at the time of the delivery of the bill by Harmer to the plaintiff, the plaintiff had notice of the premises. The 12th plea was similar to the 10th, except that it concluded with an averment that the bill was delivered by the defendant Harmer to the plaintiff, *after it became due*. On demurrer, the Court of Exchequer held both these pleas bad in substance; the Court of Exchequer Chamber upheld that judgment as to the 10th, but reversed it as to the 12th plea. It will be observed that, according to the 10th plea, the indorsement by Harmer to the plaintiff might have been made before the bill became due, and therefore before any cause of action arose upon it; so that Harmer would never have been in a position to sue upon it. But the 12th plea showed that Harmer did indorse after the bill became due; and as during the time that he held it, subsequently to its becoming due, the right of action was gone, it was gone for ever, and could not be revived by an indorsement to the plaintiff; or, in the better words of the judgment:—

“The present liability to pay, and the present right to receive, the amount of the bill, concurring in the same person, operated as a payment and performance of the contract of acceptance, on which consequently no action could afterwards be maintained; and we are of opinion that this is a ground of defence in substance.”

This, which is now the leading case on the subject, is fully in accordance with *Freakley v. Fox*, 9 B. & C. 130; S. C. 4 Man. & B. 18.

2. The rules that a covenant not to sue generally is, and that a covenant not to sue for a limited time is not, a suspension of a right of action, are most fully established. They are acknowledged as far back as 21 Hen. 7, b. 10, p. 30; and were clearly laid down in the case of *Deux v. Jefferies*, Cro. Eliz. 352. That was an action of debt on bond. Plea, that the plaintiff by indenture covenanted that he would not sue on the bond before Michaelmas; and it was agreed that the action being thereby suspended was gone for ever. But the Court resolved for the plaintiff:—

“For it is only a covenant, and shall not ensue as a release; and it is not to be pleaded in bar; but the party is put to his suit of covenant if he be sued before the time. But if it had been a covenant that he would not sue at all, then peradventure it might ensue as a release and be pleaded in bar, but not here; for it never was the intent of the parties to make it a release.”

And it was adjudged for the plaintiff. Also in *Rolle's Abridg.* 939, “Extinguishment” (L), it is laid down:—

“If the obligee covenant with the obligor, who is bound to perform covenants not to molest or sue him before a certain day, that is not any suspension of the debt; for the proper meaning is, a covenant not to sue before a certain day, and not to make that a release.”

See also *Comberbach*, 123; *Ayliff v. Scrimshire*, 1 Shower, 46; *Co. Litt.* 236; *Thimbleby v. Barron*, 3 Mee. & W. 210; *Ford v. Beech*, 17 Law J. (N. S.) Q. B. 114; *Gibbons v. Vouillon*, 19 Law J. (N. S.) 74. The reason of this distinction seems to be the desire of the Courts to carry the intention of the parties into effect, and also to avoid circuity of action. If it had been held that a covenant not to sue for a limited time was a good plea in bar to an action brought during that time, it must have been on the ground that the right of action was suspended, and if suspended it must be gone for ever, which clearly was not the intention of the parties; and therefore the Courts have held that such a covenant does not amount to an answer to the suit, but only affords the covenantee a good ground of action for the breach of it. But in the case of a general covenant not to sue, the intention of the parties must have been that the cause of action should never be enforced: and carrying that intention into effect, it is now clearly established that such a covenant releases the cause of action, and it is gone for ever. In the judgment of *Smith v. Mapleback*, 1 T. R. 446, it is said:—

“It is on this ground (circuity of action) that the Court have construed express words of covenant into a release. As, supposing the

obligee of a bond covenanted that he would not sue upon it, the Courts say that shall operate as a release; for if it operated only as a covenant it would produce two actions."

And on this ground, too, we see the reason for the distinction that a general covenant not to sue does, and a limited covenant does not, operate as a release. For if a creditor were to covenant generally that he would not sue, it is clear that the damages for the breach would amount at least to the whole of the original debt recovered. But damages for breach of a limited covenant may be very slight, as in the case of action brought on the 31st of August, in contravention of a covenant not to sue before the 1st of September; when doubtless the amount of the original debt, and of the sum recovered as damages for suing thereon, would be so unequal, that no objection on the ground of circuity would arise.

The case of *Stracy v. The Bank of England*, 6 Bing. 754, has often been quoted as an authority that a covenant not to sue for a limited time is a good answer to an action, and certainly the words of the judgment would lead to such an impression; but, on examining the facts of the case, it will be found that such a doctrine was unnecessary to support the judgment given. In that case the transfer of some stock had been forged by the celebrated Fauntleroy; the Bank of England agreed to replace the stock, provided the plaintiffs would prove for the amount under the bankruptcy of the house of which Fauntleroy was a partner; the Court, throughout its judgment, seemed to regard this agreement as the cause of action; and it was clear that, until the plaintiffs had proved under the commission (which had not been done), they were not entitled to recover on this contract; not on the ground that the agreement suspended the action, but that until it was performed on the plaintiffs' part, no cause of action existed against the defendants. If, however, this case cannot be reconciled on these grounds, we must take it as overruled; for there can be no doubt that such an agreement would not amount to a suspension of the right of action.

Clear as it is that a covenant not to sue for a limited time is no bar to an action, yet if, in addition to that covenant, there is a clause stating that if the action be brought the right shall be forfeited and gone, that will amount to a good answer. In *Carivell v. Edwards*, Carthew, 210; S. C. 1 Show. 330, a covenant not to sue for a limited time, "*Sub pœna relictionis et exonerationis debiti vel debitorum talium personarum*," was held a complete defeasance, and therefore a good answer to action brought. And in Rolle's Abridg. 939, "Exting." (L), in continu-

ation of the passage from the same work given above, it is said :—

“ But if the obligee grant to the obligor that he will not sue on the obligation before a certain day, *and that if he do that, the said covenant shall be as an acquittance, and that the obligation shall be void, and of no effect*, that is a suspension of the obligation, and consequently a release.”

See also *Ayliff v. Scrimshire*, Carthew, 63, and *Gibbons v. Vouillon*, 8 C. B. 483; S. C. 19 Law J. (N. S.) Exch. 34.

3. We now pass to the consideration of that branch of this subject which is doubtless an exception to the rule that a right of action once gone is gone for ever. It exists in this, that if having a cause of action, a bill of exchange is accepted for and on account of such debt, until the bill arrives at maturity the action cannot be proceeded with; and, to a certain extent, this must be treated as differing from the general principle above referred to. In *Comberbach*, 124, Holt, C. J., is reported to say,—

“ That the rule that a personal action once suspended is for ever extinct, does not hold in all cases.”

And it may be that this is one of those cases in which the rule does not hold. But the decisions establish that the accepting of a bill of exchange for and on account of a debt is not to be regarded strictly as a suspension of the right of action, but rather as a conditional payment.

In *Griffiths v. Owen*, 13 M. & W. 58—64, Pollock, C. B., says,—

“ The cases of *Chamberlayne v. Delamire*, 2 Wils. 353, and *Kearslake v. Morgan*, 5 T. Rep. 513, undoubtedly establish that, in the case of a money demand, if the creditor accepts a promissory note, or an order for the payment of money on account of the debt, that is a sort of qualified and conditional payment, and may be so pleaded.”

And this is recognised in *James v. Williams*, 13 M. & W. 828; *Ford v. Beach*, 17 Law J. (N. S.) Q. B. 114. But such a bill or note must be negotiable; as, if it were not so, it may be the plaintiff could take no interest in it. See *James v. Williams*, where it is said :—

“ Now the rule which has been laid down in *Kearslake v. Morgan*, and which has been confirmed in modern cases in this court, is that where bills of exchange are stated to have been delivered for or on account of a promissory note, or any other sum in the declaration mentioned, then it is to be taken as a conditional payment, but this rule is confined to *negotiable instruments alone*; and it must appear, on the face of the plea, that the plaintiff takes an interest in the negotiable instrument.”

And even this does not apply to debts of a higher nature than bills of exchange. For instance, a bill of exchange has been held no conditional payment of a debt due for rent (*Davis v. Gyde*, 2 Ad. & Ell. 623); or on a bond (*Worthington v. Wigley*, 3 Bing. N. C. 454); for an agreement by simple contract cannot affect a specialty, or debt of equal degree.

Regarding then the giving of a bill of exchange as a conditional payment, it is but reasonable that, as soon as the condition is broken, *i. e.* as soon as the bill is not paid when due, the rights of the parties are the same as if the payment had never been made; so that, if a bill so given be not paid at maturity, the original right of action revives. We must, however, somewhat qualify this; for the instrument must not only be unpaid, but also must be in the hands of the plaintiff, and not be outstanding in those of a third person; for the defendant shall not be liable to be sued on the original debt, and also on the bill (*Kearslake v. Morgan*, 5 T. Rep. 513; *Bunder v. Halton*, 4 Bing. 454).

If, however, the parties agree that the bill should be given in satisfaction and discharge of the debt, and not as a mere security for, or conditional payment of it, such an agreement will be carried into effect; for as soon as the bill is so given, it amounts to a good accord and satisfaction (*Sard v. Rhodes*, 1 M. & W. 153; S. C. 4 Dowl. 743; *Lewis v. Lyster*, 2 Cr. M. & R. 704; S. C. 4 Dowl. 377). But this proceeds from the agreement, and not from the bare act of giving the bill.

If a bill of exchange be given "for and on account of" a debt, this, in accordance with *Kearslake v. Morgan* and *Griffiths v. Owen*, amounts only to a conditional payment, and is no satisfaction. And in the case of *Maillard v. The Duke of Argyll*, 1 Dowl. & L. P. C. 586, where it was pleaded that a bill had been given "in payment," it was held that those words did not amount to satisfaction. So in *Emblin v. Dartnell*, 12 Mee. & W. 830; S. C. 13 Law J. Rep. (N. S.) Exch. 255, "discharge" was decided not to mean "satisfaction;" and in *McDowall v. Boyd*, 17 Law J. Rep. (N. S.) Q. B. 295, it was pleaded that the defendant delivered to the plaintiff a bill of exchange "for and on account of, and in payment and discharge," and the Court decided that whatever might be the exact meaning of the words "in payment and discharge," their legal effect was not equivalent to "satisfaction." As to effect of words "to take up" and "in lieu of" see *Goldshede v. Cottrell*, 2 Mee. & W. 20. The presumption, in the first instance, will be that a bill has been given "for and on account of" (*Sayer v. Wagstaff*, 5 Beav. 415). As to amount of evidence necessary

to show that it has been accepted in satisfaction and discharge, see *Baker v. Jubber*, 1 M. & Gr. 212). Therefore, if a bill of exchange has been given and accepted in complete satisfaction and discharge of a debt, it should in express words be so pleaded. It was decided in the case of *Simon v. Lloyd*, 2 Cr. M. & R. 187, that where a bill had been given "for and on account of" a debt, a plea to that effect should show that the bill is not due; and in *Mercer v. Cheese*, 4 M. & Gr. 804; S. C. 5 Scott, N. R. 664, that if the bill be overdue and unpaid, it should be shown by the plea that it was outstanding in the hands of a third person. And, in the subsequent case of *Price v. Price*, 16 Law J. (N. S.) Exch. 99, the Court of Exchequer held that if the instrument were made payable to, or made by a third person, as in the case of *Kearlake v. Morgan*, a plea stating the delivery and acceptance of the negotiable instrument, is a sufficient answer in the first instance; the fact that the plaintiff had paid the bill at maturity in the former case, or that it had been dishonoured, and notice of that dishonour given to the defendant in the latter, forming the proper subject of replication: but if the plea state no more than that a negotiable note is given for and on account of a debt, by which the defendant promised to pay the plaintiff or order a sum of money, and does not show that the note is still running or outstanding, such plea would be no answer to an action brought on the original debt.

4. The leading case we are now considering has also decided that payment can be made, or satisfaction given by a stranger, if his act be adopted by the debtor. The decision on this point is of much importance, for the authorities upon it are contradictory, and in the late case of *Jones v. Broadhurst*, 9 C. B. 173, the Court of Common Pleas having no occasion to decide the question expressly, treated it as an open and moot point. In Fitz. Abr. "Annuities," pl. 51, Hil. 83 Ed. 1, a case is reported, a translation of which is as follows: "Annuity against heir upon a deed of grant made by his father, until the defendant [read *plaintiff*] was advanced to a 'convenable' benefice; (Tilton) after the death of our father, our mother gave to the plaintiff, *at our procurement*, and in our discharge, the deanery of T., of which the plaintiff is now seized. (Heile) The writing is until he be advanced by the grantor or his heirs. (Hengham) *Qui per alium facit per se ipsum facere videtur*, and awards that he answer over. (Heile) The mother of the defendant gave us the deanery for our service, and not in discharge of the annuity, and this he is ready to verify. *Et alii e contra.*"

The words, "at our procurement," may imply, that the mother was the agent for the heir; but the more probable construction is,

"at our request she gave a benefice of her own," and if this be so, the case is certainly an authority in favour of the decision in *Belshaw v. Bush*. Again in *Fitz. Abr. "Barre,"* pl. 166, Mich. 36 Hen. 6, it is said, "If a stranger does trespass to me, and one of his relations, or any other person gives any thing to me, for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for if I be satisfied, it is not reason that I be again satisfied." *Quod tota curia concessit*. And in the case of *Jones v. Broadhurst*, referred to above, the Court, although it came to no decision on the point, said, "It must be obvious that the decision in 36 Henry 6, reported in *Fitzherbert*, is consistent with reason and justice."

There are certain cases and dicta (see *Fitz. Abr. "Dette,"* pl. 83, Hil. 35, Ed. 3; *Fitz. N. B.* 121 M.; 5 Vin. Abr. 515; *Bro. Abr. "Contract,"* pl. 29) which may appear contrary to the above doctrine, but are distinguishable in this, that they do not refer to the case of payment or satisfaction by a stranger, but to a bond or security given by him in respect of the original debt. It is true, that if a debtor on simple contract give a bond, the simple contract is merged, and the remedy is on the bond; but if a stranger do so, the original debt can still be sued upon: but this does not show that there cannot be any satisfaction by a stranger, for a bond given by him, was given as a security for and collateral to, and not in substitution of, the original debt. The case of *Grymes v. Blofield*, Cro. Eliz. 541, as there reported, is certainly an authority to the effect, that a debt cannot be satisfied by a stranger. To debt on bond it was pleaded, that J. S. had surrendered a copyhold tenement to the plaintiff, in satisfaction, which he had accepted, and the plea was held bad; but in *Rolle's Abr.* 471, the case is reported as being decided in favour of the defendant, the plea being held good. However, the result of a careful search amongst contemporaneous manuscripts (made by the direction of the Court for the purpose of the judgment in *Jones v. Broadhurst*) tends to prove that the report in *Croke* is the correct one; and this case must, therefore, be taken as an authority, in opposition to the rule established by the leading case. *Grymes v. Blofield* was recognised in the case of *Edgcumbe v. Rodd*, 5 East, 294, but the decision turned upon a different point, and the principle negatived in *Grymes v. Blofield* was scarcely argued or considered. *Thuman v. Wild*, 11 Ad. & Ell. 453, is not to be regarded as an authority either way, as it only decided that satisfaction can be made by a co-trespasser, he not being regarded as a stranger. With the law, therefore, in this state of uncertainty, the express decision by the leading case, that payment can be made by a

stranger, cannot be regarded as other than important. The case of *James v. Isaacs*, 22 Law J. (N. S.) C. P. 72, decided subsequently to *Belshaw v. Bush*, is no authority against it: in that case it was pleaded, that the plaintiff accepted an agreement by a stranger, and the performance of it, in full satisfaction and discharge of the agreement between the plaintiff and the defendants; and this was held bad, because the plea did not show that the agreement and payment made by the stranger, were made by or on behalf of the defendants, or that they adopted them; and on that ground, the Court, whilst it fully recognised the authority of *Belshaw v. Bush*, distinguished this case from it.

HENRY JAMES.

EQUITY.

MORTMAIN—LIMITS OF THE STATUTE 9 GEO. 2, c. 36—SHARES IN COMPANIES HAVING AN INTEREST IN LAND.

Myers v. Perigall, 17 Jur. 145.

WHAT descriptions of property are within the Act commonly, but erroneously, called "the Mortmain Act?" Does the Act affect shares in partnerships or companies possessed of land simply as an investment for the purposes of trade? Does it extend to shares in dock companies, canal companies, railway companies, which must necessarily be holders of land? These are important questions. "Property of this kind," as Lord Truro remarked, in sending the case before us to the Court of Common Pleas, "has now become so large, and so extensive, and it is a question so likely frequently to arise, and which has already so often arisen, and led to conflicting decisions, that it appears to me extremely important to put it in some course of final decision."

The Act in question (stat. 9 Geo. 2, c. 36), after reciting that gifts or alienations of lands in mortmain were prohibited by *Magna Charta* and other wholesome laws, as prejudicial to the common utility, and that such public mischief had greatly increased by many large and improvident dispositions made by

languishing or dying persons to charitable uses, to take place after their deaths, to the disherison of their lawful heirs, enacts, that no lands or other hereditaments whatsoever, nor any sums of money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands or hereditaments, should be given or any ways conveyed to any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever in trust, or for the benefit of any charitable uses whatsoever; unless such gifts or conveyance of any such lands or hereditaments, sums of money, or personal estate, other than stocks in the public funds, be made by deed executed and enrolled as in the Act mentioned. And the 3rd section of the Act provides that all gifts, grants, conveyances, appointments, transfers, and settlements whatsoever of any lands or other hereditaments, or of any estates or interests therein, or of any charge or incumbrance affecting any lands or hereditaments, or of any stock, money, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting the same, to or in trust for any charitable uses whatsoever, which shall at any time be made in any other manner or form than by the Act directed and appointed, shall be absolutely and to all intents and purposes null and void.

From the time it came into operation (the 24th of June, 1736), the terms of this Act have received a very wide interpretation from judicial decisions. Thus gifts of leaseholds to charitable uses are void, whether specifically bequeathed, or included in a residuary clause; and in an early case where a testator, who was possessed of a lease for years from the Crown of the right of laying chains in certain parts of the Thames for mooring ships, devised the same to charitable uses, the lease was held to be a grant of an interest in land, and within the statute, for it was clearly a franchise; and though the chains were moveable, it was no more personal than fairs or markets (*Negus v. Coulter*, Amb. 367, and note 2, by Blunt).

With respect to money secured on mortgage, Lord Hardwicke appears to have once intimated an opinion in favour of a residuary bequest including a mortgage (*Vaughan v. Farrer*, 2 Ves. Sen. 182); but that opinion has not been followed, and it was soon well settled that no distinction could be taken between a devise of mortgaged premises and of the money due on mortgage; the latter, equally with the former, was within the Act

(Attorney-General *v.* Meyrick, 2 Ves. Sen. 44; and see 4 Br. C. C. 221).

"The design of the Act," said Sir John Strange, M. R., "was to lay a restraint on every method whereby land might possibly come to such hands, unless by the manner therein prescribed: the first part, therefore, is absolute, leaving, however, more liberty as to personal estate; but seeing that would not sufficiently answer the intent of the Legislature if confined to land, it adds a prohibition as to personal estate, that it should not be given to be laid out in the purchase of land. But was there no other way whereby the interest in land might come to a charitable use? Yes, money due on mortgage was a charge and incumbrance on land, the payment of which depended on the pleasure and ability of the mortgagor; therefore, the Parliament has, by express words, taken in this by the third clause, the words of which, if they do not extend to the case of mortgages, I am at a loss to know for what purpose they were put in. The meaning was that you shall not give to a charitable use that which is or may be a charge on land, though not so at the time of the gift. Suppose a sum of money is devised to be put out on a mortgage of freehold lands, is not this restrained by the Act? If then a mere personal chattel may not, will it better the case that at the time of the gift it is actually vested? And how absurd would it be in the Parliament otherwise. . . . I should think that on the first clause mortgages are prohibited, but if doubtful on the first, the words of the other clause take it in expressly."

In *Knapp v. Williams* 4 Ves. 430, note, Lord Loughborough, C., held a mortgage of turnpike tolls within the statute, although the security was taken upon the tolls simply, and did not include the toll-houses and gates:—

"The mortgagee would have a right to come into the Court of Chancery to have an account, and a receiver appointed; he would have a right, by the aid of that Court, to have the tolls specifically applied to his mortgage. Consider what the point of law is from the nature of the interest. It is not at all within the mischief; but the consequences would open a much larger field for charitable donations. From the nature of the interest created by the Act, these tolls, granted in perpetuity, are certainly a hereditament; it is in its nature an interest affecting land. He might bring an assize for these tolls. . . . I think it falls within the general words of the statute."

So money secured by assignment of poor-rates or county-rates is within the Act, and will not pass under a bequest to a charity. In *Finch v. Squire*, 10 Ves. 41, Sir William Grant, M. R., said:—

"There is no solid distinction between money borrowed upon such a security as this, and money borrowed upon turnpike tolls. . . . In the one case, the public call for the duty on account of the passage

along the land, that it may be laid out for the purpose of public advantage, the repair of roads, and facilitating communication; in the other they actually burthen the land, by burthening the occupier with the duty for other public purposes of convenience and advantage. The land pays so much rent in consequence of the occupier being liable to the poor-rates, otherwise the landlord would have more rent; so all that is paid in respect of the land is got from the land as much as the rent arises out of the land itself; it is more properly to be said to arise out of the land because it is in respect of the occupation, than the tolls for the mere privilege of passing."

So a bequest of bonds of the commissioners for the improvement of the city of Bath, bonds of the corporation of Bath, and bonds of the commissioners of a turnpike, for a charitable purpose, was held void in *Howse v. Chapman*, 4 Ves. 544; where, however, as observed by Sir C. Pepys, M. R., in *The Attorney-General v. Giles*, 5 Law J. (N. S.) Chan. 45, it does not appear on what grounds the decision was made, nor on what estates the bonds were secured.

Thus far the current of authorities was strongly adverse to the validity of charitable donations by will. The first decision which indicated an opposite inclination is that of Lord Cottenham, when Master of the Rolls, in the case of *The Attorney-General v. Giles*, already mentioned. That was a bequest of East India stock to Christ's Hospital; and it was contended that the East India Company being holders of land, the charity, if it took the stock, would become part-owner of land. But his Honour held that such stock was not within the Act, observing, that it appeared plainly, by a reference to the statutes affecting the company, that the company was originally unconnected with land, and was merely a trading company. The only land they held was that which they had for the convenience of the trade, from the profits of which they must pay the dividends.

This decision was followed by Lord Langdale, M. R., in *March v. The Attorney-General*, 5 Bea. 433, where policies of assurance, by which the directors engaged "to pay out of the funds," or "that the funds should be liable," or "that a share of the funds should be paid," are not so connected with land as, under the Mortmain Act, to render invalid a gift of them to a charity, although the assets of the assurance companies consist partly of real estate.

These authorities were confirmed by Knight Bruce, V. C., in *Thompson v. Thompson*, 1 Coll. 381; and by Lord Langdale, M. R., in *Sparling v. Parker*, 9 Beav. 450; and again by Knight Bruce, V. C., in *Hilton v. Giraud*, 1 De Gex & Sm. 183, where bequests of shares in the London Gas-light and Coke Company,

and other companies, possessing real estate for the purposes of their respective undertakings, were held not within the statute. "A trade," observed his Honour, in the case last cited, "can hardly be carried on without some interest in land. Even a merchant must rent or own a counting-house, or the room in which he carries on his business. The business of these companies consists in taking care of goods and ships. My opinion is, that stock in these corporations is not an estate in hereditaments, corporeal or incorporeal, within the meaning of those expressions in the statute."

Thus stood the law on this important question down to the year 1848, when the harmony of authorities was disturbed by the publication of a case decided as long previously as the year 1823, but of which, owing to the peculiar method of reporting adopted in this country, no record was made public for a quarter of a century. We allude to the case of *Tomlinson v. Tomlinson*, reported 9 Beav. 459, from a manuscript note, for which the reporter expresses himself "indebted to the kindness of a friend." The testator in that case had directed certain charitable bequests to be paid out of his shares in canal companies incorporated by Acts of Parliament, by which it was expressly declared, "that the said shares should be deemed personal estate, and should be transmissible as such, and that the said shares should be, and they were thereby, vested in the several subscribers, and their several and respective successors, executors, administrators, and assigns, to their and every of their proper uses;"—declarations, in effect, precisely similar to those under which Lord Langdale and Vice-Chancellor Knight Bruce, in the cases above referred to, declared charitable bequests to be valid. But by the decree in *Tomlinson v. Tomlinson*, Sir John Leach, as it was now discovered, had declared, "that the charitable bequests which were by the said will directed to be paid out of the said testator's canal shares were all void, being contrary to the Statute of Mortmain."

Here, then, was a clear conflict of authority, and the law was again restored to uncertainty. The words of the Act were large:—"Lands or hereditaments, or any estate or interest therein." The earlier decisions, on which we rely with more than usual confidence for a declaration of the meaning of the Legislature, gave, if possible, a greater latitude to those words, for the purpose of avoiding charitable bequests. Subsequently a new species of property, not contemplated when the Act was passed, nor when those decisions were made, had arisen, and was constantly increasing to an extraordinary extent. Recent decisions had determined, that the species of property in question

was not affected by the provisions of the Act; but such decisions were not uniform, and were at variance with the principle of the earlier authorities;¹ and although Lord Langdale, in *Walker v. Milne*, 11 Beav. 511; and Sir J. Knight Bruce, in *Ashton v. Lord Langdale*, 15 Jur. 868, notwithstanding Sir John Leach's authority, affirmed the doctrine of their former decisions in favour of such charitable bequests, it was impossible to look upon the state of the law relating to charitable bequests of this nature as clear and satisfactory. Lord Langdale, in his latest decision on the subject, expressed his earnest wish that the question might come under the consideration of the Lord Chancellor.

In *Myers v. Perigall*, the question was brought under the consideration of the two Lord Chancellors, Lord Truro and Lord St. Leonard's. That was an appeal from a decision of the late Vice-Chancellor of England (16 Sim. 533), where he held, affirming the finding of the Master, that certain shares of the Northumberland and Durham District Bank, bequeathed for charitable purposes, were chattels real, or savouring of the realty, and, therefore, within the statute. By the deed establishing the bank it was declared, that the directors should

¹ Whoever will be at the pains to examine the earlier authorities, will see that they went to restrain, not only such charitable donations as might have the effect of rendering land inalienable, but charitable donations generally. "It is not at all within the mischief," says Lord Loughborough, in a case already mentioned in the text, "*but the consequences would open a much larger field for charitable donations.*" Every one must agree with Lord Langdale's remarks in *Walker v. Milne*, 13 Beav. 517:—"One of the counsel, in arguing this case, did not exceed the liberty which he was entitled to take upon himself when he said that 'The Court would have done a great deal better, by at once expressing its disapprobation of the former decisions, and by overruling them, than by attempting to reconcile them, or to come to a conclusion consistent with those prior decisions.'" Compare the observations of Lord Brougham, on hearing a late appeal case in the House of Lords:—"It would have been more satisfactory had the learned judges admitted at once that they erred in deciding that case, to which their decisions in the two latter are wholly opposed. But this silence is much more to be commended than the practice sometimes followed in cases of erroneous judgments afterwards departed from; I mean that of endeavouring to find out special circumstances to distinguish the several cases, for the purpose of making it appear that the decisions are reconcilable. Much bad law is thus occasionally introduced, and not soon got rid of. Parties are encouraged to try points which ought to be considered desperate, and the Courts, which consult those conflicting cases, are not seldom misled in search after authority. No judge ought to be ashamed, after erring, to acknowledge his error; still less has a Court any reason for so misplaced a shame, so unseemly a reluctance, to admit that the dispensers of justice are subject to the common lot of erring humanity" (2 H. L. C. 666, 667).

accumulate unemployed capital; and that, for that purpose, they might invest the same on mortgage or purchase of freehold, copyhold, or leasehold lands, tenements, and hereditaments, in Great Britain; and might, from time to time, sell the same, and reinvest in like manner. It was also declared, "that all the property of the company, as between the shareholders thereof, and as between the respective real and personal representatives, should always be considered and deemed to be personal estate." So that the questions involved in the conflicting decisions noticed above were fairly raised. Lord Truro, C., was prepared to affirm the decision of the Vice-Chancellor of England, but the appellants took the offer of a case for the opinion of the Court of Common Pleas, and that Court certified that the bequest was a legal bequest within the statute; and in conformity with their certificate Lord St. Leonard's held, supporting the recent decisions to which we have referred, that the property was well given to the charity.

The principle upon which Lord St. Leonard's supported the recent decisions, the current of which, he admitted, had set against the old cases, was this, that by the very constitution of the partnerships in question, the interest of the shareholders was an interest in personalty, an interest which must go and remain in them as personalty; and, as such, would pass to their personal representatives, to the absolute exclusion, under every conceivable state of circumstances, of their real representatives. The subject itself was an interest in trade, and in trade only: the possession of land was an adjunct or incident to the carrying on of that trade, and it was immaterial whether such possession was a necessary adjunct, as in the case of dock and other companies, the very names of which implied the possession of land as essential to, and co-extensive with, the carrying on of their respective undertakings, or whether such possession arose under powers of investment, for the purpose of accumulation; that is, with a view to profit, and not with a view to hold it.

"Suppose this banking company had purchased real estate under the provisions of this deed, which, no doubt, they were at liberty to do, but at liberty to do only for the purpose of *quasi* investment, not to purchase it as real estate or retain it as real estate; but to purchase it as they would a vessel, or anything that was the subject of value, in order to sell it to advantage at a future period, and they are bound to sell it by the terms of the deed. If they did sell it, what were they to do with the money? Why, invest it in the Funds. Therefore, it is not property as real estate as regards any partner."

No one or more of the partners could, as against the rest, enter upon and claim, or charge, or encumber, any portion of such real estate. No partner has, nor can any partner ever obtain, any higher interest in respect of his shares than as an individual partner seeking profit out of the property of the partnership, in whatever shape that property may be found.

"Observe what the difficulty would be. If a partner dies at one moment, you find no real property, but you find the same interest, the same capital to be disposed of, and the same beneficial interest, neither more nor less. If he dies at another moment, you find some real property. Could that alter the distinction, or could it alter either the guarantee of interest, or the nature of the property to be given by him? Clearly not. His legatees would take neither more nor less than just the same interest, if there was no real property purchased, which they would take if there was real property purchased. Therefore, upon all principle, I should hold it to be perfectly clear, that this is not a property within the Act of Parliament."

Upon the whole, then, we infer, from the foregoing decisions, that while "there is no doubt," as Lord St. Leonard's expressed it, "that anything which is dedicated to a charity, and which savours of realty, is within the Act of Parliament," so that "you cannot dedicate any estate, or interest in, or any charge or incumbrance on real estate;" nevertheless, in the case of any partnership or company possessing land, whether for the purpose of carrying on the trade or business of such company, as docks, railways, counting-houses, or as an investment of unemployed capital, and to be resold at a profit, shares which by the constitution of the company, whether as declared by Act of Parliament, or by the company's deed of settlement, would pass to the executors or administrators of the shareholder or partner to the exclusion of his heirs, are not a species of property within the meaning of the Act.

The more recent authorities to which we have referred should be noted in reference to the observations in Mr. Shelford's "Treatise on the Law of Mortmain," p. 160; and in Mr. Jarman's "Treatise on Wills," vol. i. p. 199; in the latter of which it is stated as clear that "the statute extends to canal shares, and of course dock or railway shares."

It should be observed that the decision of Lord Langdale, in *Walker v. Milne* (*ubi supra*), that bonds, secured by an assignment of "the rates, tolls, and duties" of certain canal companies, were not within the statute, and which, as we have seen, is opposed to some of the earlier authorities, is not confirmed by anything which fell from Lord St. Leonard's in the leading case, who leaves it "to be maintained on the authority of that learned

judge." Also that in *Ashton v. Lord Langdale* (*ubi supra*), decided two years after *Walker v. Milne, Knight Bruce, V. C.*, held mortgages of railway undertakings and the tolls to be within the Act. "Railway shares," his Honour said, "are not covered by the words of the Act, or within the meaning of it; but mortgages of the undertakings *and the tolls* proceed from the corporation directly, and plainly are an incumbrance on, and directly and immediately charge, hereditaments, namely, tolls on the land itself from which the tolls are obtained."

H. R. V. JOHNSON.

STATUTE OF LIMITATIONS, 3 & 4 Wm. 4, c. 27—EXPRESS TRUST
—ARREARS OF ANNUITY SECURED BY A SUBSISTING TRUST
TERM.

Young v. Lord Waterpark, 10 Jur. 1; *Cox v. Dolman*, 17 Jur. 97.

THE stat. 3 & 4 Wm. 4, c. 27, which provides for the limitation of actions and suits, contains special provisions for cases of express trust. The 25th section of the Act provides that where any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que* trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.

In all cases where a *cestui que* trust seeks to recover land or rent (in the sense in which the word is defined by the first section of the Act), the effect of this section is clear. It renders lapse of time unimportant between the *cestui que* trust and his trustee until the trust is disturbed, and that disturbance can only be effected by such a denial of the trust as takes place when the trustee sells to a third party for valuable consideration the property so held by him in trust (4 Dru. & War. 408).

But where the *cestui que* trust seeks to recover money secured in any manner upon land or rent, his right to do which is limited by the 40th section, or arrears of rent, or interest of money so charged, his right to recover which is limited by the 42nd section; great difficulty has arisen in attempting to discover the true meaning of the Act. For the 25th section in words

extends only to suits for the recovery of the land or rent itself, and neither the 40th nor the 42nd section contains any reference to the 25th section, or any provision for relief against a trustee. Did the framers of the Act intend to keep open a remedy against a trustee of land or rent where the *cestui que* trust is entitled to the very subject, and to close the door against a *cestui que* trust of the produce of the subject, however extensive his right?

This question arose in the case of *Young v. Lord Waterpark*, on appeal from the late Vice-Chancellor of England (6 Jur. 656; appeal, 10 Jur. 1). There, by marriage settlement, lands were settled on the husband for life, with remainder to the first and other sons in tail male, subject to a term of five hundred years, thereby created and vested in trustees, for the purpose of raising 10,000*l.* for the younger children of the marriage, on their attaining twenty-one. In 1804 the tenant for life died, at which time all the children were of age. Upon a bill being filed in 1830 by the representative of two of the children against the tenant in tail and the trustees of the term, to have 3,000*l.*, the residue of the 10,000*l.*, raised, and paid out of the estate, Lord Lyndhurst, C.,¹ held, affirming the judgment of the Vice-Chancellor, that inasmuch as there could be no adverse possession by a trustee as against his *cestui que* trust, the claim was not barred by the 40th section of the Act.

"In this case," said his Lordship, "the term of 500 years is still in the trustees; and there is nothing, therefore, contained in the statute to prevent them from raising the residue of the 10,000*l.* in the manner directed by the settlement; and the money, when so raised, would be held by them as trustees, for the purposes of the settlement. . . . To a case like the present, between a trustee and *cestui que* trust, the statute has no application. The trustee did not hold adversely to the *cestui que* trust, but for them, and for their use and benefit."

The terms of the Act had occasioned much embarrassment to the judicial authorities, but by the decision in *Young v. Lord Waterpark*, the construction was considered as settled; nor would the question have ever been raised again, but for the decision of Lord Cottenham, C., in *Hunter v. Nockolds*, 1 Mac. & Gor. 640, S. C. 14 Jur. 256, where although there existed a trust to secure the annuity, and the same argument might

¹ In the report of *Cox v. Dolman*, 17 Jur. 97, this decision is attributed to Lord Cottenham: "I do not think," Lord St. Leonard's is reported as having observed in the course of the argument, "that *Hunter v. Nockolds* can be cited as the opinion of Lord Cottenham against the express decision of the same judge in *Young v. Waterpark*." But see the date of the latter decision, 10 Jur. 1.

have been raised on the 25th section as was raised in *Young v. Lord Waterpark*, yet that point appears to have been entirely overlooked, and the decision of the Lord Chancellor, reversing that of Sir J. Wigram, V.C., proceeded entirely on the 42nd section of the Act.

Here, then, fresh doubts and difficulties were raised; and those, too, of such importance, that in deciding the case of *Cox v. Dolman*, which we have placed with that of *Young v. Lord Waterpark*, at the head of this paper, the Master of the Rolls expressed his anxiety that that case, in which the same question was involved, should be heard before the full Court of Appeal in Chancery—Lord St. Leonard's, C., and the Lords Justices.

In *Cox v. Dolman*, a testator, by his will, dated 1820, devised lands to trustees, to the use and intent that his son and daughters should receive out of the rents, a rent-charge of 200*l.* each, during their joint lives; and that, upon the decease of any one of them, the two survivors might receive thereout one yearly charge of 300*l.* each, during their joint lives; and after the decease of either of them, that the ultimate survivor should receive thereout one yearly rent-charge of 400*l.* for life, with powers of distress and entry, and subject thereto to the use of other trustees for ninety-nine years, upon trust, for better securing the due payment of the rent-charges, with remainder over. The testator died in 1829. In April, 1852, there were arrears of annuities due to the plaintiff, one of the daughters, for between nineteen and twenty years. The question was whether the estate was liable to more than six years' arrears. The Court held that it was; and it was declared that the whole arrears were to be raised.

"The question," said Lord St. Leonard's, "has been clearly settled by the case of *Young v. Lord Waterpark*, from which it is impossible to distinguish the present. In this case, the legal estate remains undisturbed, and the person who has that estate vested in him is a trustee, and may recover the estate, and acquire possession. I consider it perfectly clear, that so long as that right remains in the trustee, the rights of the *cestui que* trust are not barred; for, as the trustee can execute the trust, it follows, that when he does, the rights of the *cestui que* trust immediately arise, and he is entitled to the full benefit of the trust. Sections 40 and 42 have very much the same object,—one as to principal, the other as to interest; and the question is, whether they constitute an independent bar, so as to prevent the trustees from raising the arrears. I cannot see any ground for such an argument, it being admitted that this is a subsisting term in the trustee, and that he may recover possession of the land. . . . I am clearly of opinion, that there is no ground upon which to impeach

the decision in *Young v. Lord Waterpark*. I have very frequently considered that case, and have never been able to find any fault with the decision."

We conclude, therefore, that so long as a trust term to secure annuities or legacies is a subsisting term, upon which the trustee can recover possession, the annuitants or legatees are not barred by the statute from recovering any amount of arrears.

The case of *Cox v. Dolman* may be noticed in reference to Lord St. Leonard's remarks in his recent "Essay on the New Statutes," p. 105, where the same view is adopted.

H. R. V. J.

Short Leading Cases.

COMMON LAW.

DEL CREDERE COMMISSION—GUARANTEE.

Conturier v. Hastie, 22 Law J. Exch. 97.

THE construction of the guarantee clause of the 4th section of the Statute of Frauds has been often elaborately discussed, and, it was presumed, thoroughly settled. The leading interpretation put upon it has been that laid down in *Williams's Saunders*, 211 e note 1, supported by *Lane v. Burghart*, 1 Q. B. 933; *Bird v. Gammon*, 3 B. N. C. 883; *Bushel v. Beavan*, 1 B. N. C. 103; *Green v. Creswell*, 10 Ad. & Ell. 453.

"The question," says the learned annotator, "whether each particular case comes within this clause of the statute or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant, except such as arises from his express promise."

John William Smith lays down a similar rule, more tersely and yet more fully. Citing the above, he says:—

"The question is, whether it is or is not a promise to answer for a debt, default, or miscarriage of another, for which that other continues liable. If it be so, it must be reduced to writing, *nor can the consideration in any case be of importance*, except in such cases as *Goodman v. Chase*, in which the consideration to the person giving the promise is something which *extinguishes* the original debtor's liability."

In *Morris v. Cleasby*, 4 M. & S. 566, a *del credere* commission was declared to be "the premium or price given by the principal to the factor for a guarantee; it presupposes a guarantee, that the obligation of the factor arises on the guarantee, and that the guarantor is to answer for the solvency of the vendor, and to pay the money if the vendee does not." A *del credere* commission does, therefore, appear, *prima facie*, to have all the incidents of such an undertaking to pay the debt, default, or miscarriage of another, as the 4th of the statute requires to be in writing, nor is it to be wondered at that

Mr. Chitty, in the last edition of his able work on Contracts, expressly so states the law.¹

The reverse has, however, been held in the case before us. The plaintiff was the vendor of corn, which the defendant, as his *del credere* agent, undertook to sell, and, in fact, did sell, to the vendee, who refused to abide by the contract; and the defendant, being sued by the vendor, it was objected for the defendant, that the contract was a guarantee, not in writing, as required by the Statute of Frauds. The Court held otherwise, on the ground chiefly, that a higher reward is paid in *del credere* commissions, on account of the greater care taken with the sales, and the greater responsibility incurred. And that though the contract "may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given; and this case resembles, in this respect, those of *Williams v. Leper*, 3 Burr. 1886, and *Castling v. Aubert*, 2 East, 325." The Court also referred to similar reasons given in one of the American Courts for this same decision (5 Hill, N. Y. Report, 458).

It may also be advanced in support of this ruling, that inasmuch as the *del credere* agent did not disclose the name of the vendee to his principal, the vendor, nor of the principal to the vendee, there is, in effect, no privity of contract between them, and the agent is himself, not only personally, but solely liable to both parties (*Higgins v. Senior*, 8 M. & W. 884). But, if so, there is no subsisting debt due to the principal, or party to whom the promise is made, by any other person than the guarantor; and the only debt for which he is liable to the principal, is not "the debt of another," but his own debt; for the vendee owes the principal nothing, nor can the vendor look to the vendee for payment, but solely to the agent. Thus, it was not a promise made to the person to whom the original debtor was liable, as, according to *Eastwood v. Kennion*, it must be, to require a written note. And there was a liability on the part of the agent *dehors* that which arose on his express promise, and flowing from his own duty and obligation. The non-performance, therefore, of the contract between the latter and the vendee was no default towards the plaintiff, and the undertaking by the defendant was no promise to answer for the debt or default of another to the vendor.

A *del credere* commission thus is not a guarantee, but

¹ It would appear to be now settled, that the liability of a *del credere* agent is collateral to that of the vendee; that his conduct, in short, is strictly a guarantee; and such being the case, it follows that his engagement should be in writing.—Chitty on Cont. 196.

implies an original promise by the agent to the vendor, and not a collateral one, requiring to be in writing under the Statute of Frauds.

J. C. SYMONS.

ARTIFICERS UNDER THE TRUCK ACT.

Sharman v. Sanders, 22 Law J. C. P. 86; *Riley v. Warden*, 2 Exch. 59.

THE TRUCK ACT, 1 & 2 Wm. 4, c. 37, enacts, that in certain specified occupations (chiefly iron manufactures and mining) all artificers are to be paid their wages for any labour performed by them therein in the current coin of the realm, and not in goods. And the Act goes on to declare all contracts for the payment of such labour otherwise than in the coin aforesaid illegal; and that in any action by such artificer to recover his wages, the defendant may not plead the payment of goods in lieu of money. Section 25 defines artificers to be "persons in any manner engaged in the performance of any work, employment, or operation, of whatever nature soever in or about the several trades," &c. aforesaid.

In the cases cited, the question arose, whether a person who contracts to do any of the work in the specified employments, and does it by means of men he employs under him, is or is not an artificer, to whom money-wages are the only legal payment.

In *Riley v. Warden*, which is the parent case under the Act, the plaintiff had contracted to perform certain cuttings on a railway; and it was proved that he both employed other men to do the job and worked at it himself. It was held, that inasmuch as it was no part of the contract with the defendants that he should work himself, he was a sub-contractor, and not an artificer, within the meaning of the Act; which was intended, in fact, to protect those only who earn their bread by their daily labour, and who are to receive wages for it, but that the price of a contract cannot be regarded as wages of labour.

In *Weaver v. Floyd*, 21 Law J. Q. B. 151, the same point was raised again; but in that case the plaintiff, though he similarly contracted for work to be done in a colliery, nevertheless contracted also to work himself. This was held to distinguish this case from the last; and Pattenon, J., said:—

"If the agreement was that the plaintiff should work personally, though he may employ others under him, he was, I think, an artificer under the Act of Parliament; but if the contract was, that the plaintiff undertook a portion of the time to gain coal by the hands of others, without being bound to go to it or to work at it himself,

then I should say that the case fell within the principle of *Riley v. Warden*."

In *Sharman v. Sanders*, the facts were very similar to those in *Riley v. Warden*. The plaintiff had not (as in the last-named case) contracted to work himself, though he had done so. The only point of difference was, that in *Riley v. Warden* he had supplied materials, whereas in this case he had not. It is obvious, that such an incident nowise affects the principle laid down; and the Court upheld the decision in *Riley v. Warden*, and ruled that the plaintiff was not an artificer, nor within the protection of this Act.

The only arguable doubt in these cases seems to arise entirely from the breadth of the terms of the interpretation clause as respects the term artificers, who are defined as "persons in any manner engaged in the performance of any work, &c., of what nature soever, in or about the several trades," &c. The decisions of the Courts, therefore, in effect, define the words, "engaged in the performance" as meaning, having contracted to perform the work with his own hands. Mr. Justice Maule explained the principle to be, "that the Act never intended to protect a person who speculates on the state of the labour market, and who knowing what he is engaging to do, knowing what he has the means of knowing with respect to the present and probable future rate of wages, and acquainted with the work to be done, engages to get a certain quantity of work done at a certain price." The persons who are protected, to use Mr. Justice Maule's words, are "persons who are hired to labour with their hands for daily wages." It is to be wished, that if the Legislature had this very rational purpose and distinction in view, it should have so stated it. The cases cited seem to restrict the protection given by the *terms* of the Act.

It is worthy of remark, that in each of the cases the plaintiff's labourers had been paid partly in goods from the shop of the defendants by means of tickets payable therein. They (the labourers) were clearly within the protection of the Act, and might themselves have sued for their full money-wages. This might have been used as an argument in support of the view taken by the Court, for it never could have been intended that the protection should extend at once to employed and employer: even though the latter were a sub-contractor. J. C. S.

PARENT AND CHILD.

Reg. v. Smith, re Boreham, 22 Law Jour. Q. B. 116.

THE father has supreme control over his children, and the

power of the mother over them is subordinate to his. In *Rex v. De Mandevill*, 5 East, 221, it was held, that where a wife has separated from her husband, he may, by *habeas corpus*, compel their delivery to him, even though at the breast. There is a mistaken notion, nevertheless, that the mother can insist on having her children till they are seven years old. *Rex v. Greenhill*, 4 Ad. & Ell. 624, is a strong case against this view. Not only is the father entitled to the custody of his children, but he cannot divest himself of the right, as this leading case fully shows; for the father here had signed an agreement, on his wife's death-bed, that he would allow their child to remain in the custody of its uncle, and would not seek to remove it. He afterwards, notwithstanding the agreement, took her away; and the Court of Queen's Bench held, that the agreement was merely in the nature of a consent, which the father might at any time revoke. A father, therefore, cannot divest himself of his parental right to the custody of his child; and any contract he enters on to do so is revocable; and the Court will interfere actively to uphold the right and restore the child, even where the father has parted with its possession.

J. C. S.

RAILWAY COMPANY—CONTRACTS WITH DIRECTORS.

Foster and others v. Oxford and Wolverhampton Railway Company,
22 Law Jour. C. P. 99.

THE Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 86, provides "That if any of the directors [of a railway company] at any time subsequent to his election, be either directly or indirectly concerned in any contract with the company, or participate in any manner in the profits of any work to be done for the company, the office of such director shall become vacant." On the strength of this clause, the defendants pleaded, that Barker, one of the plaintiffs, was a director at the time when the contract was made on which the action was brought. On demurrer to this plea, Mr. Justice Maule remarked, that "The statute does not say that a director shall not contract with the company;" and Mr. Justice Cresswell observed, "That the statute did not say that the contracts are to be void, which disposed of the case." The Act, as the Chief Justice said, "Only means that no person shall be interested in a contract with the company while he is a director, and if he be so, then the penalty is, that he ceases to be a director." It was well put by Mr. Gray, for the defendants, that the mischief which the Legislature must have contemplated is, that if direc-

tors were allowed to contract with the company, their own interests might tend to make such contracts unfavourable to the shareholders. We cannot, however, agree with the conclusion drawn, that "if the only consequence be that such contracting director shall cease to be a director, there is no remedy at all for the contemplated mischief." It seems to us, that the consequence is a heavy penalty, and sufficiently remediable and preventive. It seems that the contract in this case was made as far back as April, 1846. Supposing the plaintiff, Mr. Barker, to have remained in the Board, he has, nevertheless, ceased to be a director ever since; for the clause deposes him, when the contract is made *ipso facto*, and every one of his acts since done is invalid. There can be no doubt as to the soundness of the decision, but as railway companies may not have so interpreted the Act, we have thought it well to give what prominence we could to this case; the practical result of which is, that all contracts made between railway directors and the company to which they belong are valid, but that the director, *ipso facto*, ceases to be such. J. C. S.

PRIVILEGE OF ATTORNEY IN PRODUCING DOCUMENTS.

Dwyer v. Collins, 7 Exch. 639; Volant v. Soyer and Symons,
22 Law Jour. C. P. 83.

THE relation of attorney and client forbids the disclosure of any fact, or the delivery of any document, of which the attorney has cognisance or possession in virtue of that relation.

The above cases bore entirely on the production of documents; and first, how far the attorney may be questioned about it: secondly, on refusing to produce it, on what terms secondary evidence of its contents are admissible.

Although the decisions do not alter the principle of the law as it previously stood, the privilege of the attorney is so far limited, and the judgments of both Courts of Common Pleas and Exchequer are so positively given, that it is expedient to record both of these as leading cases on the subject.

As regards the first point,—the trust protected in the attorney is held so sacred that no question as to the nature of the document is permitted. It may not be even asked if it is a trust deed, or, if a will, whether of personalty or realty; and still less may the judge look at it to ascertain its nature. This was laid down in the judgment in *Doe d. Carter v. Jones*, 2 Mood. & R. 47, and is cited and fully confirmed in *Volant v. Soyer*. This rule admits of no exception. As Mr. Justice Maule observed, "In many cases the judge would be the very last person to whom

the client would like his letter or deed to be shown." Whatever new powers may exist which facilitate the production of documents otherwise than by means of the attorney in possession of them, his right to withhold them, if he got possession of them in his professional character, is inviolate and "entire." It is sufficient if the attorney say he has received the document professionally to justify his refusal to produce it. See also *Harris v. Hill*, 3 Starkie, 140. The privilege, however, extends only to facts which have exclusively come to the knowledge of the attorney by reason of his professional relation to his client. If he be cognisant of them *aliunde*, the privilege does not extend to such knowledge, and he is bound to disclose them; though it may be that, "if he had not been employed as an attorney he probably would not have known them. Thus he may prove the client's swearing to the truth of an answer in Chancery; and his handwriting, by seeing it in documents prepared by him in the name of his employer. In the same way he may prove the fact, that a particular document is then in his possession and in Court, for this is not a fact professionally communicated to him" (*Dwyer v. Collins*). See also, on this last point, *Bevan v. Waters*, 1 Moo. & M. 235, and *Coates v. Birch*, 2 Q. B. 252.

As regards the second point, it is settled law, that where the production of a document is refused on the ground of the attorney's privilege, secondary evidence of its contents is admissible. And as the law makes no degrees of secondary evidence, any will suffice. This was finally decided in *Doe d. Gilbert v. Ross*, 2 Exch. 122.

In that case, however, another point was mooted, which was left undecided, namely, that though the attorney might refuse to produce a document—insisting on his privilege—the client might waive it: thus unless he also were subpoenaed to produce the document, and refused to do so, all was not done that might be done to show that the primary evidence was unattainable, so as to let in secondary evidence.

This point was again mooted in *Newton v. Chaplin*, 19 Law Jour. C. B. 374, and in *Volant v. Soyer*; in which latter case reference was made to the opinion expressed by Mr. Pitt Taylor in his very able work on Evidence. He says:—

"It may be questionable whether, in the event of an attorney declining to produce an instrument on the ground of privilege, it be not necessary to show that his client has also been subpoenaed, and has relied on his right to withhold the deed."

The question is not solved in the last-named cases, and admits of further doubt. It is, however, not essential to subpoena the client, if it be shown that the client as well as the attorney insist on the privilege to withhold the primary evidence in

order to let in secondary. In *Newton v. Chaplin*, the client had been subpoenaed, though not *duces tecum*, and was in court. He refused to allow the document to be produced, and of course thus let in the secondary evidence. In *Volant v. Soyer*, however, when it was put by counsel, that "at all events it should be shown that the refusal of the attorney was by the direction of his client," Chief Justice Jervis interposed and said, "that must be assumed." Mr. Justice Cresswell also says: "It has been suggested that the client should have been called; but that was unnecessary." It certainly appears that the act and discretion of the attorney is that of his client, at any rate until the contrary be shown.

Nevertheless, the Common Bench did not seem to think so in the judgment in *Newton v. Chaplin*, where it was held that secondary evidence was admissible, because,—

"As the book was in court, and the plaintiff had procured the attendance of both the attorney and client, who expressed to the Court their refusal to allow the book to be produced, he had done everything that could be done to make apparent the impossibility of using the primary means of proof; and, consequently, that he was entitled to resort to secondary evidence."—Per Maule, J.

The inference is clear, that had no means been taken to show the refusal by the client, the secondary evidence would have been held inadmissible by the Court.

In *Hibbard v. Knight*, the Court of Exchequer seems to have held it sufficient to subpoena *duces tecum* the party who has possession of the deed, "and on receiving his refusal, being privileged," says Mr. Baron Parke, "you may give secondary evidence of the contents of the deed, as you have done everything to obtain it."

There is therefore a discrepancy between the decisions of the Common Bench, in *Newton v. Chaplin* and *Volant v. Soyer*, and the Exchequer on this point, which must be left for future decision.

It has been further mooted, whether it be necessary to give a certain length of notice to the attorney to produce the document required; and the point is fully decided in the negative; as ruled in *Dwyer v. Collins*, "The only possible object of a notice to produce a certain time beforehand, is 'to enable the opposite party to be prepared, either to support or impeach the instrument,'" as laid down by Mr. Starkie. Now this is precisely what the party calling for it is not bound to do; and it was held by the Court that Mr. Starkie's principle is without authority, and that it is sufficient to give notice to produce, even in court, if the document be there; and if not, as short a time previously as will suffice to bring it.

J. C. S.

Short Notes of New Books.

The History and Effects of the Laws of Mortmain. By W. F. Finlason, Esq., Barrister-at-Law. London: Dolman, 1853.

A **SUCCINCT** and admirable treatise, well deserving of that careful analysis and description which we are, in this number, prevented from giving it by its very late arrival.

The Land Tax of India, According to Moohummudan Law. By Neil Baillie, Esq. Smith and Elder, London. Smith and Taylor, Bombay, 1853.

WE can give no opinion of this book till we have had more time to consider it. We shall bestow a leading article, shortly, on the state of the law in India.

Forms of Declarations, Pleadings, and other Proceedings in the Superior Courts of Common Law, with the Common Law Procedure Act, 1852. By Henry Greening, Esq., Special Pleader. Second Edition. London: Butterworths, 1853.

SEVERAL of the most commonly required forms of pleading under the New Act are carefully drawn in this little work, which has already reached a second edition.

Observations sur la Statistique Intellectuelle et Morale de la France pendant la Période de Vingt Ans (1828-47). Par M. P. Fayet. Extrait du Correspondant, Recueil Périodique. Paris: Charles Douniol, 1852.

A **WELL-COLLATED** series of facts and tables illustrative of the social economy of France.

Reasons Against proposed Changes in the Constitution of the Sheriff Courts of Scotland, in a Series of Letters, addressed to the Right Honourable James Moncrieff, M.P., Lord Advocate. By Robert Stuart, Esq., Advocate. Edinburgh: Bell and Bradfute. London: Butterworth and Son, 1853.

A **VERY** able and unanswerable argument against the proposed alteration of the Sheriff Courts, in which Mr. Stuart denounces the attempt to get up a popular cry on the subject, and develops the merits of the present system. These letters will well repay the perusal of all those who wish to obtain a correct insight of the question at issue, now hotly debated in Scotland.

The Administration of Justice in Southern India. By John Bruce Norton, Esq., Barrister-at-Law. London: Stevens and Norton. Madras: Pharaoh and Co., 1856.

AN almost hopeless, though a vigorous and very able attempt to awaken attention in England to the iniquitous system of administering justice (?) in India, an evil indeed "of monstrous growth, of which the people of England have no idea."

The Case of Practice in the High Court of Chancery. By Thomas Kennedy, Esq., Solicitor. Vol. ii., part 2, containing the General Orders from 7th August, 1852, to March, 1853. Forms, Table of Fees, &c. Butterworths, London, 1853.

THIS part sustains the character of the work, and a very full index completes it. The Forms are well and carefully drawn.

The Magisterial Synopsis. By George Oke. Fourth Edition. Butterworths, London, 1853.

THIS new edition of this valuable and most useful book is enriched with all that the practitioner can require under the new statutes of the last two years on Evidence and Criminal Justice. New topics are also added under the heads of Common Lodging-houses, Arsenic, Industrial Societies, &c. Others have been enlarged and revised, and facilities of reference improved.

Altogether, a more complete book of its kind has seldom been published. The Tabular Synopsis is at once so easy of reference, that it is one of the few works which can be used, and the subject found at a single moment, even in the course of business.

A Treatise on the Law and Practice relating to Letters Patent for Inventions. By John Paxton Norman, Esq., M.A., Barrister-at-Law. London: Butterworths, 1853.

THE cases are carefully and fully detailed, and the law regarding Patents may be readily gathered from the work.

The Law and Practice of Election Committees, being the completion of a Manual of Parliamentary Election Law. By Samuel Warren, Esq., F.R.S., Q.C., and Recorder of Hull. London: Butterworths; Blackwood & Sons, Edinburgh; Hodges & Smith, Dublin, 1853.

THIS is a very careful completion by Mr. Warren of the work we had occasion so fully to criticise and commend in a recent number. Its utility is much increased by the pains the learned and eloquent author has bestowed on it.

Events of the Quarter.

MISCELLANEOUS.

It has been rumoured that Mr. Justice Maule is likely to retire from ill-health. Thank God, it is not so; we can ill afford to lose his acute intellect and highly-educated mind from the Bench.

The new Budget lays a tax on successions, and in several other respects adopts the principles of direct taxation as recommended in our last number. It is as good an instalment as we expected.

ATTORNEY'S TAXES.—The taxes to which attorneys are subject are, a stamp of 120*l.* upon the articles of clerkship, which on an average produces annually 72,000*l.*; a tax of 25*l.* upon admission, producing annually 12,000*l.*; and thirdly, the tax of 12*l.* yearly for a certificate, if practising in London, Edinburgh, or Dublin, and 8*l.* yearly if practising in any other part of the United Kingdom; this producing annually upwards of 118,600*l.* This treble taxation amounts in the whole to upwards of 200,000*l.* per annum.

The proposal in the new budget to reduce these taxes by one quarter is simply ridiculous.

APPOINTMENTS, &c.

The Lord Chancellor has appointed J. Bellenden Ker, J. W. Rogers, Chisholm Anstey, George Coode, and K. Brickdale, Esqrs., to be the barristers to assist his Lordship in framing the code of statutes. Their salaries are 600*l.* per annum each, except Mr. Ker, who is to have 1,000*l.* They have begun their labours. We are surprised to see that Mr. Arthur Symonds, the well-known author of the "Mechanics of Legislation," is not included in the arrangements, though no one has more thoroughly investigated the subject. At any rate, the name of Mr. Edward Beavan should have been added.

DOWNING-STREET, March 26.—The Queen has been pleased to appoint Robert Hodgson, Esq., to be Chief Justice for Prince Edward Island, and Joseph Holroyd, Esq., to be a member of the Legislative Council of that island. Her Majesty has also been pleased to appoint Robert Crosby Beete, Esq., to be First Puisne Judge of the colony of British Guiana. Her Majesty has also been pleased to appoint Charles Douglas Stewart, Esq., to be her Majesty's Attorney-General, and James Clement Choppin, Esq., to be her Majesty's Solicitor-General for the island of St. Vincent; and George Rutherford, Esq., to be Collector of Customs for the district of Natal, in South Africa.

W. S. Shoobridge, Esq., is appointed Clerk of the County Courts of Kent, vice G. W. Ledger, Esq., resigned.

The Attorney-General has nominated Mr. John Wickens and Mr. T. H. Terrell to represent him in Equity, in the matters relating to public charities. The right hon. gentleman has also selected Mr. Alfred Harrison to be Counsel in Equity to the Board of Works and to the Commissioners of Stamps and Taxes. The above offices are vacant by the appointment of Mr. W. Milbourne James to the office of Vice-Chancellor of the Duchy of Lancaster, in the room of Mr. Bethel, Her Majesty's Solicitor-General.

The Queen has been pleased to make the following appointments for the Colony of Victoria, *viz.*, Edward Byre Williams, Esq., to be Second Puisne Judge of the Supreme Court; William Foster Stawell, Esq., to be Her Majesty's Attorney-General; James Croke, Esq., to be Her Majesty's Solicitor-General; Henry Field Gurner, Esq., to be Crown Solicitor; Robert Williams Pohlman, Esq., to be Commissioner of the Court of Requests, and Chairman of General and Quarter Sessions; Frederick Wilkinson, Esq., to be Master in Equity of the Supreme Court, and Chief Commissioner of Insolvent Estates.

Mr. Pierce Mahony, who held the office of Clerk of the Crown to the Court of Queen's Bench, died on February 20th, of paralysis of the brain. Mr. Wilson, of the Crown Office, was sworn in Clerk of the Crown *ad interim*. The emoluments are about 1,000*l.* a-year.

Mr. J. Blakeney, of Galway, has been appointed Crown Solicitor of that county, in the room of his brother, Mr. James Blakeney, who has retired from the office.

Mr. Pickering has been appointed Recorder of Pontefract, in the room of Mr. Boothby, appointed Puisne Judge at Adelaide.

CALLS TO THE BAR.

INNER TEMPLE, Jan. 26.—The under-mentioned gentlemen were this day called to the Bar by the Honourable Society of the Inner Temple:—Frederick Ross Vallings, M.A.; Thomas Chandless, the younger; Robert George Moncrieff Sumner, M.A.; Charles Dudley Robert Ward; Charles Samuel Bagot; William Finnie, B.C.L.; John Bell Brooking; William Finch Edwards, M.A.; James Christie Traill; Henry John Simonds; Franklin Lushington, M.A.; Charles Penruddocke; Nathaniel Simpson; Felix Vincent Raper, B.A.; William Pearson; William George Harrison, B.A.; John Lindsey Reed; Frederick Hoare Colt, B.A.; William Ernst Browning, Esq.

MIDDLE TEMPLE, Jan. 26.—Edward Godman Kirkpatrick; Wilfrid Hudleston Simpson; Charles Smith; Stephen Martin Leake; William Talfourd Salter; Albany Fonblanque; Owen Saunders

Wilson; John Henry Patteson; James Maurice; John Thornley; John William Grigg; Edmund Macrory; Thomas M'Enteer; Robert Orridge; John Price; Edward William Hornby; Henry Stephen Hansler; Boswell Hensman; Roger Godsden; and George Pringle, Esquires.

GRAY'S-INN, Jan. 26.—At a pension of the Honourable Society of Gray's-Inn, holden this day, Leonard Hill, Esq., was called to the degree of Barrister-at-law.

LINCOLN'S-INN, Jan. 26.—Henry Bonham Carter; George Norman Maule, M.A.; Elphinstone Barchard, M.A., Esquires.

DOCUMENTS, &c.

PUBLIC EXAMINATION, TRINITY TERM, 1853.

THE COUNCIL OF LEGAL EDUCATION have approved of the following Rules for the Public Examination of the Students.

The attention of the Students is requested to the following Rules of the Inns of Court:—

“As an inducement to students to propose themselves for examination, studentships shall be founded of fifty guineas per annum each, to continue for a period of three years, and one such studentship shall be conferred on the most distinguished student at each public examination; and further, the examiners shall select and certify the names of three other students who shall have passed the next best examinations, and the Inns of Court to which such students belong may, if desired, dispense with any Terms, not exceeding two, that may remain to be kept by such students previously to their being called to the Bar. Provided that the examiners shall not be obliged to confer or grant any studentship or certificate, unless they shall be of opinion that the examination of the students they select has been such as entitles them thereto.

“At every call to the Bar those students who have passed a public examination, and either obtained a studentship or a certificate of honour, shall take rank in seniority over all other students who shall be called on the same day.

“No student shall be eligible to be called to the Bar who shall not either have attended during one whole year the lectures of two of the readers, or have satisfactorily passed a public examination.”

Rules for the Public Examination of Candidates for Honours, or Certificates entitling Students to be called to the Bar.

An examination will be held in next Trinity Term, to which a student of any of the Inns of Court, who is desirous of becoming a candidate for a studentship or honours, or of obtaining a certificate of fitness for being called to the Bar, will be admissible.

Each student proposing to submit himself for examination will be required to enter his name at the treasurer's office of the Inn of Court to which he belongs, on or before Friday, the 20th day of

May next, and he will be further required to state, in writing, whether his object in offering himself for examination is to compete for a studentship, or other honourable distinction; or whether he is merely desirous of obtaining a certificate, preliminary to a call to the bar.

The examination will commence on Monday, the 23rd day of May next, and will be continued on the Tuesday and Wednesday following.

Each of the three days of examination will be divided as under:— From half-past nine, A.M. to half-past twelve; from half-past one, P.M. to half-past four.

The examination will be partly oral, and partly conducted by means of printed questions, to be delivered to the students when assembled for examination, and to be answered in writing.

The oral examination and printed questions will be founded on the books below mentioned; regard being had, however, to the particular object with a view to which the student presents himself for examination.

In determining the question whether a student has passed the examination in such a manner as to entitle him to be called to the Bar, the examiners will principally have regard to the general knowledge of law and jurisprudence which he has displayed.

The Reader on Constitutional Law and Legal History will expect the Students to be acquainted with the following Books, which will form the ground of his examination:—

Hallam's Constitutional History, last volume. The Reign of William the Third, in Tindal or Belsham. Millar on the English Constitution. The Reign of Queen Anne, in Tindal or Belsham. The Statute Book during the Reigns of Charles the Second, William the Third, and Queen Anne. The State Trials during the same period. The Parliamentary History during the same time. Mably, *Droit Public de l'Europe*. The Fragment of Sir James Macintosh. The First and Fourth Volumes of Blackstone's Commentaries.

Those who are candidates only for certificates will be expected to know the last volume of Hallam's Constitutional History, and to answer any general questions on the History of England.

The Reader on Equity will examine in the following Books:—

1. Mitford on Pleadings in the Court of Chancery; Calvert on Parties to suits in Equity, chaps. 1 and 2; Smith's Manual of Equity Jurisprudence; the Act for the Improvement of Equity Jurisdiction, 15 & 16 Vict. c. 86. 2. Sir James Wigram's Points in the Law of Discovery, "Defence by Plea;" Story's Commentaries on Equity Jurisprudence, Vols. I. and II.; the principal cases in White and Tudor's Leading Cases, Vols. I. and II.

Candidates for certificates of fitness to be called to the Bar will be

expected to be well-acquainted with the books mentioned in the first of the above classes.

Candidates for a studentship or honours will be examined in the books mentioned in the two classes.

The Reader on Jurisprudence and the Civil Law proposes to examine in the following Books and Subjects :—

1. Justinian, Institutes, book 2, tit. i.—ix. 2. Gaius, Institut., lib. ii. sect. 1—96. 3. Story, Conflict of Laws, chaps. ix. and x. 4. The Jur. Pignoris. The modern authorities consulted may be Warnkönig, Institut., lib. i. cap. 5; or Colquhoun, Roman Civil Law, book iii. tit. 17. 5. The Right of Visitation and Search.

Candidates for distinction will be examined in all the foregoing books and subject.

Candidates for a certificate will be examined in (1) and (3).

The Reader on the Law of Real Property proposes to examine in the following Books and Subjects :—

Class I.—Williams on Real Property; 1 Steph. Com. book ii.; and Butler's Notes to Co. Lit. 191 a, sect 2, 5; 271 b.

Class II.—Trusts for Accumulation, and the operation of 39 & 40 Geo. 3, c. 98. Powers of Sale, and the Liability of Purchasers to see to the Application of their Purchase Money. The Statutory Rules of Construction laid down by the 1 Vict. c. 26.

Candidates for a certificate merely will be examined exclusively in the books comprised in Class I.

Candidates for a studentship or other honourable distinction will be examined in the books and subjects comprised in Class I. and II.

The Examination in Common Law, with a view to a Certificate to be called to the Bar, will embrace the following Subjects :—

1. The ordinary Steps and Proceedings in an Action at Law. 2. The Elementary Principles of the Law of Contracts.

Candidates for the studentship and for honours will be examined not only on the above topics, but also in the following books and subjects :—

1. The Nature and Requisites of Contracts (Chitt. Jun. on Contracts not under Seal, chaps. i. and iv.; *Collins v. Blanton*, 1 Smith, L. C. 184; and *Mitchel v. Reynolds*, Id. 171, with notes thereto). 2. The Law of Bailments (so far as treated off in Chitt. Jun. on Contracts not under Seal, pp. 408—433; and in the note to *Coggs v. Bernard*, 1 Smith, L. C. 82). 3. The Rules of Evidence of ordinary application.

By order of the Council,

W. P. WOOD, Chairman, *pro tem.*

Council Chamber, Lincoln's-Inn,

April 11, 1853.

ECCLESIASTICAL COURTS. — The following resolutions have been agreed to by the Committee on Ecclesiastical Courts, and have been ordered to be submitted to the Society for Promoting the Amendment of the Law :—

1. That the present jurisdiction of the Ecclesiastical Courts, so far as testamentary matters are concerned, is universally admitted to be unsatisfactory, and requires extensive reform.
2. That this reform should consist of a transfer of their present jurisdiction in testamentary matters to a court clothed with jurisdiction as well over wills of real as of personal estate.
3. That to create a new court for the purpose would be unadvisable, if any existing court can be found to which such enlarged jurisdiction may be properly intrusted, and to which complete powers can be given.
4. That the existing courts of common law and county courts, not having an equitable jurisdiction or power of dealing with trustees, or with equitable matters arising in the construction of wills, should not, as at present constituted, be intrusted with such enlarged jurisdiction.
5. That the existing courts of equity, not having any power of empannelling a jury, or of conclusively deciding issues of fact, are under a similar disqualification.
6. That, in order to do complete justice in testamentary matters, it is necessary that the court to which they are intrusted should possess the full and enjoined powers of a court of law and of a court of equity.
7. That no thorough or satisfactory settlement of the questions pending with respect to the testamentary jurisdiction of the Ecclesiastical Courts can be come to, except by its being exercised by a court of conjoined law and equity, having jurisdiction over wills of real and personal estate.
8. That it is the bounden duty of the Government of this country to provide such a court for the proper adjudication of all testamentary matters, and of this society to promote its establishment by every means in its power.
9. That the most desirable means of affecting this appears to be the union of the present law and equity commissions, and inviting their immediate attention to this important question.
10. That the above resolutions be taken as the basis of the first report of this committee.

NECROLOGY.

THE RIGHT HON. DAVID BOYLE.—This estimable gentleman, who so long filled the most prominent legal position in Scotland, died on Friday, February the 25th, at his seat at Shewalton, in Ayrshire, in his 81st year.

January.

- 20th. COOKE, John Athanasius, Esq., barrister; aged 55.
 21st. JONES, John, Esq., Town Clerk of Beaumaris; aged 69.
 27th. WATTS, Anthony, Esq., solicitor, at Epping.

February.

- 3rd. BOWLES, John, Esq., barrister.
 6th. EVANS, John H., Esq., solicitor.

February.

- 18th. PULLEN, James Thomas, Esq., solicitor, at Peckham; aged 45.
 23rd. PARRATT, Edward, Esq., Clerk of the Journals of the House of Lords.
 16th. CARR, Robert, Esq., solicitor, at Wakefield; aged 63.
 9th. HODGSON, Joseph, Esq., solicitor, at Bradford; aged 51.
 16th. SCATCHELD, N. C., Esq., barrister, at Morley House, near Leeds; aged 73.

March.

- 26th. FITZ HERBERT, E. H., Esq., of the Inner Temple, barrister; aged 48.
 28th. GAUNT, Matthew, Esq., solicitor, Leeds; aged 70.

April.

- 3rd. MORRIS, Richard, Esq., of the Middle Temple, Barrister-at-Law, and Assistant Master of the Court of Exchequer.
 4th. BOWCOCK, G., Esq., solicitor, Congleton.
 8th. WATKINS, James K., Esq., solicitor, Bolton-le-Moors.
 10th. DUCAT, James Stuart, Esq., W. S., Edinburgh.
 12th. INGLE, Thomas, Esq., Clerk to the County Court of Derbyshire, at Belper.

List of New Publications.

Archbold—The Poor-Law: comprising the whole Law of Settlement, and all the Authorities upon the subject of the Poor-Law generally. Brought down to March, 1853, with Forms. By J. F. Archbold, Esq., Barrister. 12mo. 17. 5s. boards.

Archbold—The New Rules of Practice in the Courts of Law, and the New Rules for the Examination, &c., of Attorneys; Tables of Costs, and the Common Law Procedure Act; with an elaborate Index. By J. F. Archbold, Esq., Barrister. Royal 12mo. 4s. sewed.

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Bankruptcy—The Pounds, Shillings, and Pence of Bankruptcy. By a Working Member of the Court. 8vo. 1s. sewed.

Barclay—A Digest of the Law of Scotland, with special reference to the Office and Duties of a Justice of the Peace. By H. Barclay. 8vo. 17. 10s. 6d. cloth. (Edinburgh.)

Blackstone—An Abridgment of Blackstone's Commentaries on the Laws of England, for the use of Young Persons, and comprised in a Series of Letters from a Father to his Daughter. By Sir J. E. E. Wilmot, Bart. New edition. By his Son, the present Bart., and Barrister. 12mo. 6s. 6d. cloth.

Chitty—A Practical Treatise on the Law of Contracts not under Seal, and upon the usual Defences to Actions thereon. By J. Chitty, Jun., Esq. The 5th edition. By J. A. Russell, Esq., Barrister. Royal 8vo. 17. 11s. 6d. cloth.

Convocation—Opinions of Sir F. Thesiger, Sir W. P. Wood, and Dr. R. Phillimore, respecting the Constitutional Powers of Convocation. 8vo. 1s. sewed.

Cooper—A Manual of Chancery Chamber Practice according to the Act 15 & 16 Vict. c. 80, and the Orders for carrying it into effect. By C. P. Cooper, Esq., Q.C. 12mo. 1s. 6d. sewed.

Cooper—The Chancery Acts and Orders of 1852 and 1853, with Indexes. By C. P. Cooper, Esq., Q.C. 2nd edition. 12mo. 4s. cloth.

Cripps—How to Rate a Railway in accordance with the Decisions of the Court of Queen's Bench, containing Suggestions for practically applying the Law of Rating to the case of Railways. By H. W. Cripps, Esq., Barrister. 12mo. 2s. sewed.

Dwarris—A Letter to the Lord Chancellor on the Consolidation of the Statute Law. By Sir F. Dwarris. 8vo. 1s. sewed.

Holland—The Common Law Procedure Act, 15 & 16 Vict. c. 76, and all the New Rules and Orders of Hilary Term, 1853; together with the proposed New Rules for Trinity Term, 1853; with Notes and Cases, and Index to the whole. By H. T. Holland, Esq., Barrister. 2nd edition. 12mo. 8s. cloth.

Inwood—Tables for the Purchasing of Estates, Freehold, Copyhold, Leasehold, &c. By W. Inwood. 14th edition. 12mo. 7s. boards.

Kennedy—The Code of Practice of the High Court of Chancery. By Thomas Kennedy, Solicitor. Vol. 2, part 2, containing the General Orders, 1852 and 1853; Forms; alphabetical Table of Fees; and a copious Index. 12mo. 4s. 6d. sewed.

Kerr—The New Rules of Practice in Civil Actions in the Courts of Common Law, 1853. By R. M. Kerr, Esq., Barrister. 12mo. 4s. sewed.

Law Reform—A Letter to the Lord Chancellor Cranworth on the Bills lately introduced by Lord Brougham, and now before Parliament, on the further Extension of the Jurisdiction of the County Courts. By a Law Reformer. 8vo. 1s. sewed.

Lees—The Laws of Shipping and Insurance; with copious Index, and containing the Statutes, &c. By T. Lees. 12mo. 6s. 6d. cloth.

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Williams.—Principles of the Law of Real Property, intended as a First Book for Students in Conveyancing. 3rd edition. By J. Williams, Esq., Barrister. 8vo. 18s. cloth.

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ALL THE CASES, IN ALL THE COURTS

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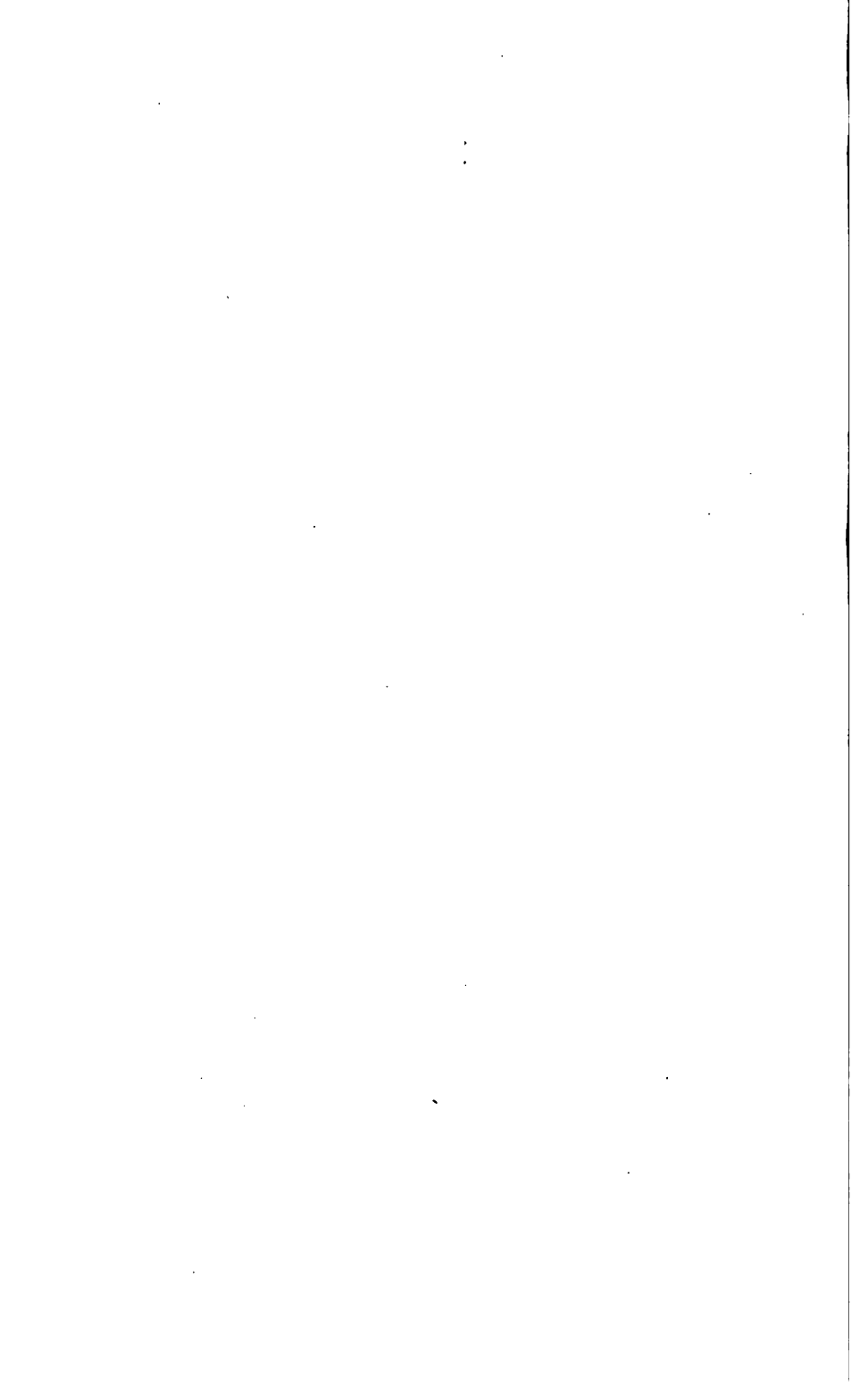
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COMMON LAW.

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10 Common Bench Reports, parts 4 and 5.	21 Law Journal (N. S.), parts 10 and 11.
7 Exchequer Reports, parts 2 and 3.	

ACCOUNT STATED—*Evidence of.*—Declaration on a banker's cheque and on an account stated. The cheque was post-dated, and, in support of the account stated, the plaintiff relied on a letter of the defendant's, in these terms : " I must request you to oblige me by holding my cheque till Monday, and in the interim I will send you the amount in cash. I made a mistake in dating it to-day, as I did not expect to be in funds till Friday or Saturday : " Held (Erle, J., dissenting), that the letter was not evidence of an account stated, so as even to entitle the plaintiff to nominal damages, there being no statement of any sum acknowledged to be due. *Lane v. Hill*, 21 Law J. (N. S.) Q. B. 318.

ACTION.—*When maintainable*—*Exclusive tribunal.*—By the 6 & 7 Vict. c. 79, the articles of a certain convention between Her Majesty and the King of the French, concerning the fisheries between the British islands and France, are declared to have the force of law. By these articles all transgressions of the regulations are in both countries to be submitted to the exclusive jurisdiction of the tribunal or magistrates designed by law, who are to settle all differences and decide all contentions between fishermen of the two countries, and the trial and judgment is always to take place in a summary manner. This tribunal is also to have power to award damages for injuries over and above the penalties. By section 11 of the Act, all offences against the articles committed by British subjects are to be determined by justices of the peace, who are also declared to have the power of awarding compensation for injuries : Held, that no action could be maintained for an injury caused by a breach of any of the regulations, as exclusive jurisdiction in such matters was given to the tribunal

specified in the Act. *Marshall and another v. Nicholls*, 21 Law J. (N. S.) Q. B. 343.

ANNUITY.—1. *Assignment.*—E. H. L., who resided at Sidney, New South Wales, being entitled to an annuity for his life, assigned it, in 1847, to certain trustees, to dispose of it for his benefit. The plaintiff entered into a correspondence, by letter, with the trustees upon the subject of the purchase; and from the various letters which passed between the parties, it appeared that the terms of the purchase were not finally determined upon and settled until the 28th of February, 1849. Upon the 6th of that month the annuitant died. The purchase-money was paid by the plaintiff in ignorance of the fact, and was ultimately received by the executrix of the deceased: Held, that as at the time of the purchase of the annuity it had ceased to exist, the plaintiff was entitled to recover back the whole of the purchase-money from the executrix, on the ground that the money had been paid without consideration. *Strickland v. Turner, executrix of Lane*, 7 Exch. 208.

2. *Power to appoint—Condition—Dower.*—Where a testator by his will gives a power to A. B. to appoint to his wife an annuity, chargeable upon the land of the testator, if A. B. shall think fit, and A. B. makes the appointment, but with the condition that the wife takes it on relinquishing her dower, legacy-duty is payable upon such annuity under the 45 Geo. 3, c. 28. Where such condition is annexed by the original testator himself, *quære* whether duty is payable either upon the whole annuity or upon the amount of it after deducting of the dower. A. B., by his will made in 1821, after disposing of his property in various ways, and after giving directions as to the purchase of estates in the county of S. with the proceeds of estates in the counties of E. and K., directed a deed of settlement of his estates to be executed, and that there should be inserted in such settlement a power to the tenant for life, and entitled to the rents and profits of the estate so to be settled, by deed or will duly executed, to charge all or any part of such estates with any annual sum or sums of money, not exceeding one-third part of the annual value thereof, unto or for the benefit of any woman or women with whom he or they might respectively happen to intermarry, or with whom he or they might have intermarried, as, and for, and in the nature of a jointure. Upon the death of A. B., in 1822, C. D. succeeded to the estates, and by his will, in execution of that power, and of all other powers given, charged all the estates he had power to charge with the payment of the annual sum of 2,000*l.*, free and clear from taxes, and without any other deduction whatsoever, unto and for the benefit of his wife, Lady H., during the term of her natural life; the said yearly rent, or annual sum of 2,000*l.*, to be in the nature of and in full for the jointure of his said wife, and to be in lieu, bar, and satisfaction of and for her dower or thirds, at common law or by or on account of customary free-bench, which she could and would or otherwise might have or claim, of, in, or out of the freehold, copyhold, or customary manors of C. D. This will also provided, that in

case C. D. was not authorized and empowered by the will of A. B. to charge the estates thereby devised and directed to be purchased and settled respectively, as aforesaid, with the payment of so large an annual sum as 2,000*l.* by way of jointure, the deficiency, if any, should be a charge upon, and the said C. D. thereby expressly made liable to and charged such part and parts of his real estates, by his will devised, as should not be sold under the trusts in his will contained, as thereafter mentioned, with the payment of such deficiency. Upon the death of C. D. the defendant succeeded to the estates as heir at law, and entered into possession and receipt of the rents and profits, and made several payments of the annuity to Lady H., the wife of C. L., who was a stranger in blood to A. B.: Held, that legacy-duty was payable upon the whole of the annuity, and that the defendant, either as trustee or the person in possession, was the party bound to pay it. *The Attorney-General v. Lord Henniker*, 7 Exch. 331.

ARREST.—*Privilege—Judge's chambers.*—An attorney's clerk going to or returning from judges' chambers, on business having reference to a pending suit, is not privileged from arrest. *Phillips v. Pound*, 21 Law J. (N. S.) Exch. 277.

ASSIGNMENT. See ANNUITY, 1.

ATTORNEY.—*Delivery of signed bill.*—The defendant, who was an attorney, wrote to the plaintiff, also an attorney, a letter, inclosing a writ of summons in a cause of P. v. B., requesting the plaintiff to serve it, and to send the defendant an account of his charges. The plaintiff, in answer, sent a letter, headed P. v. B., informing the defendant of the service of the writ pursuant to his instructions, and that his charges, enumerating the items, were 1*l.*0*s.*6*d.*: Held, that the plaintiff's letter was a compliance with the 6 & 7 Vict. c. 73, s. 37, and gave the defendant sufficient information by reference to the writ of the court in which the business was done. *Cozen v. Graham*, 21 Law J. (N. S.) C. B. 206.

ATTORNEY OF MORTGAGEE.—*Negligence.*—The plaintiff employed the defendant, an attorney, to sue W. for a debt. W., to induce the plaintiff to forbear to sue, offered to give him a mortgage on some freehold property in which he had a reversionary interest. The plaintiff agreed to accept it under the advice of the defendant, who was accordingly employed by him to act as his attorney in respect of the mortgage transaction, and to prepare the mortgage-deed. The defendant stated to his clerk that he must write to his town agents to make the necessary searches to see whether W. had taken the benefit of any of the Insolvent Acts. No such letter appeared to have been written, but he sent his clerk to inquire personally of W. whether he had ever been insolvent. W. denied that he had, and the mortgage was executed and the proposed action was dropped. The plaintiff afterwards discovered that W. had previously petitioned the Insolvent Court and had obtained an order for his protection. He thereupon sued the defendant for negligence and want of skill in

ascertaining W.'s title, in not making searches to ascertain whether W. had been insolvent: Held, that the action was maintainable; for that whenever the attorney of a proposed mortgagee has reason to suspect that the intended mortgagor has been bankrupt or insolvent, it is the duty of the attorney to make proper searches to ascertain the fact, and that there was some evidence of negligence in this case, since the defendant by his own language and conduct showed that he had a suspicion on the subject, and felt that it was his duty to make a search, which he had not done. *Cooper, appellant; Stephenson, respondent*, 21 L. J. (N. S.) Q. B. 292.

BANKRUPT LAW CONSOLIDATION.—1. Bankruptcy certificate.—To an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded that being a trader he presented a petition to the Bankruptcy Court under the 12 & 13 Vict. c. 106, which Court appointed a private sitting, and that fourteen days before such sitting written notice was given to every person whom the defendant then knew to be his creditor, or whom he had any means of knowing to be his creditor, and amongst others, to the drawer of the bill of exchange; and that he did not at the time of giving such notices, nor did the Bankruptcy Court nor the official assignee, know that the drawer had indorsed the bill, or was not the holder, or who was the holder, or the address of such holder; that the defendant filed an account of his debts, wherein he set forth a proposal to pay his creditors 7s. 6d. in the pound; that at such private sitting of the Court of Bankruptcy the requisite number of creditors proved their debts and assented to the defendant's proposal; that the Bankruptcy Court proposed another sitting; of which the plaintiff had notice; that at such second meeting the requisite number of creditors proved their debts and agreed to accept the defendant's proposal; that the Court of Bankruptcy then confirmed the proposal and agreement, and afterwards gave the defendant a certificate in the form in Schedule A: Held, first, that the plea was bad in not averring that the resolution and agreement had been carried fully into effect, and the creditors satisfied, pursuant to the 21st section of the 12 & 13 Vict. c. 106. Secondly, *dubitante* Martin, B., that the plaintiff was not barred as to his debt, seeing that he had not had notice of the first sitting. *Quære*, whether any of the creditors are bound by the certificate, unless notice of the previous meetings be given to all of them. *Alcard v. Messon*, 21 L. J. (N. S.) Exch. 281.

2. Deed of arrangement.—A deed of arrangement between a trader and his creditor, executed by six-sevenths in number and value of the creditors, whose debts amount to 10l., is not binding on a creditor not party to the deed, under the Bankrupt Law Consolidation Act, 1849 (the 12 & 13 Vict. c. 106, s. 224), unless the deed provides for the distribution of the whole of the trader's estate among his creditors. *Tetley and another v. Taylor*, 21 L. J. (N. S.) Q. B. 346.

BARON AND FEME.—Statute of Limitations.—A declaration against husband and wife stated that the wife *dum sola*, together with

J. A., made their joint and several promissory notes payable to the plaintiff, and the wife *dum sola* promised to pay the same to the plaintiff. The declaration was (after issue) amended, by adding that the husband, after the marriage, in consideration of the premises, promised to pay the plaintiff the said note. The defendants pleaded the Statute of Limitations. The evidence was, that the note was made in 1837, and that interest was paid on it regularly until 1843, when the defendants married. On the 10th of August, 1844, a year's interest was paid by the female defendant, but without her husband's privity. The action was commenced on the 2nd of August, 1850: Held, that under these circumstances no promise was proved within six years, as none could have been made by the wife *dum sola* within that period, and as the payment made by the wife was within six years, without her husband's privity, no promise by him could be inferred: *Semble*, that the declaration as amended was bad in arrest of judgment. *Neve and another, executors, v. Holland and Uxor*, 21 Law J. (N. S.) Q. B. 289.

BILL OF LADING.—1. *Construction*—"Loss by robbers."—The defendants received goods at Panama to be carried to and delivered in London, the act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers and steam, the dangers of the seas, roads, and rivers, of whatever nature or kind soever, excepted. The goods were stolen without violence when in the course of transmission from Southampton to London: Held, that this was not a loss within the exception either of robbers or dangers of the roads, as the word 'robbers' meant loss by violence, and 'dangers of the roads' meant either dangers of roads where ships lie at anchor, or such dangers on land as more immediately occur on roads; *e.g.* the overturning of the carriage. *De Rothschild and others v. The Royal Mail Steam Packet Company*, 21 L. J. Exch. 273.

2. *Promissory note*.—An instrument was drawn in the following form: "Two months after date I promise to pay to A. B., or order, 99l. 15s.—H. Oliver." At the foot it was addressed to J. E. Oliver, and across it was written—"Accepted; payable, S. and A., Bankers, London.—E. Oliver." Held, that in an action by the payee against the drawer, it might be treated and declared upon as a bill of exchange. *Lloyd v. Henry Oliver*, 21 L. J. (N. S.) Q. B. 307.

CARRIERS BY RAILWAY.—1. *Limitation of liability*—*Notice*.—The plaintiff being the owner of a horse, delivered it to the defendants, a railway company, to be carried on their railway, subject to conditions which stated that the owners undertook all risks of conveyance whatsoever, as the company would not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling on the railway. The horse having been injured by the horse-box being propelled against some trucks, through the gross negligence of the company: Held, *hesitante* Platt, B., that the company, under the terms of the contract, were not responsible for the injury. *Quere*, whether the company would have been re-

sponsible if the horse had been stolen. *Can v. Lancashire and Yorkshire Railway Company*, 21 L. J. (N. S.) Exch. 261.

2. *Notice*.—The respondent took a horse to a station on the railway of the appellants, who were common carriers of horses, to be carried to a distance along the line. After paying the charge for the carriage, he signed a ticket produced by the company's clerk, which stated: "This ticket is issued subject to the owner's undertaking to bear all risk of injury by conveyance and other contingencies, &c.; the company will not be responsible, &c., for any damages, however caused, to horses, &c., travelling upon their railway, or in their vehicles." The horse was injured during the journey: Held, that this ticket was not a mere notice which would be void under sec. 4 of the Carriers Act, 11 Geo. 4 & 1 Wm. 4, c. 68; but contained the terms of a special agreement between the respondent and the company, which was valid under sec. 6 of the statute, and that consequently the company were protected by its terms from any liability in respect of the injury to the animal. *The Great Northern Railway Company, appellant; and Morville, respondent*, 21 Law J. (N. S.) Q. B. 319.

CHURCH DISCIPLINE ACT.—*Sentence of suspension—Prohibition*.—A commission of inquiry had issued under the Church Discipline Act (3 & 4 Vict. c. 36) against a clerk in holy orders, upon a charge for which, if substantiated, a sentence of deprivation might be pronounced; and the commissioners having reported to the bishop of the diocese that a *prima facie* case was made out for instituting further proceedings, the clerk submitted to sentence being pronounced against him without any further proceedings, according to a provision in the Act, which enables the bishop in such a case to pronounce such a sentence as might be pronounced after a full investigation. The bishop accordingly decreed that the clerk should be suspended from all discharge and function of his clerical offices for three years, and directed by the decree, that at the expiration of the three years he should procure a certificate, signed by three beneficed clergymen, of his good behaviour and morals during his suspension, and that such certificate should be approved of by the bishop before the suspension should be taken off: Held, that the bishop had jurisdiction to annex this condition to the sentence of suspension, and a motion for a prohibition was refused. *Ex parte Rev. F. Rose, D.D.*, 21 Law J. (N. S.) Q. B. 339.

CONTRACT.—*Condition precedent and subsequent*.—In 1845, the defendants, commission agents in London, wrote to the plaintiffs, merchants at Madras, as follows:—"At the request of Messrs. K. and L., of Glasgow, we beg to open a credit in your favour to the extent of 1,500*l.*, to be applied to the execution of an order they have given you for Madras handkerchiefs, and for cost of which as produced, you draw on us at the customary date on forwarding bills of lading to our order." In consequence of this letter, two orders given by K. and L. were executed by the plaintiffs, who forwarded the goods and bills of lading to the defendants, and they accepted and paid bills

drawn on them in accordance with the letter. In February, 1847, K. and L. wrote to the plaintiffs, inclosing patterns for a third order, saying, "You will for cost consign goods as before." The plaintiffs executed this order, and on the 21st of August shipped the goods on account of K. and L., and sent to the defendants the invoice and bill of lading, inclosed in a letter, saying, "We have as usual drawn upon you at six months for the equivalent of the amount of invoice." The bill of lading stated the goods to have been shipped by the plaintiffs and to be delivered to the defendants or their assigns on payment of freight. The invoice stated that the goods were consigned to the defendants on account and risk of K. and L. The letter containing the bill of lading and invoice was received by the defendants on the 26th of August, and the goods arrived in London on the 21st of October. On the same day the plaintiffs' agent received a bill drawn against the goods, and caused it to be presented to the defendants for acceptance; but they refused to accept it. On the 27th of October K. and L. stopped payment. The goods were received by the defendants under the bill of lading and sold, and the proceeds retained by them. On the 4th of March, 1848, the plaintiffs gave the defendants notice, that they claimed to stop the goods *in transitu*, the defendants having refused to accept the bills, and the plaintiffs subsequently brought an action to recover the proceeds of the sale as money received for their use: Held, first, that it was a question for the judge, and not for the jury, to decide whether, under the circumstances, the property in the goods vested absolutely in K. and L. or merely conditionally on the acceptance of the bill by the defendants. Secondly, that the contract was not subject to the condition, either precedent or subsequent, that the defendants should accept the bill; but that the property in the goods vested absolutely in K. and L. upon the delivery on board the ship and transmission of the bill of lading to the defendants. Also, that if the plaintiffs had intended to preserve their right of property in the goods until the bill was accepted, they should have transmitted the bill of lading, indorsed in blank to an agent, to be delivered over only in case the bill was accepted. *Key and others v. Cotesworth and others*, 7 Exch. 595.

CORPORATION.—*Contract not under seal—Necessary purpose.*—If the guardians of a poor-law union, at a board properly constituted and authorized to enter into contracts, give orders to a tradesman to supply and put up water-closets in the union workhouse, and he puts them up, and the guardians approve and accept them, they cannot afterwards defend themselves in an action against them for the price, by showing that there was no contract under seal, as the purposes for which the guardians were made a corporation require that they should provide such articles. *Clarke and another v. The Guardians of the Cuckfield Union*, 21 Law J. (N. S.) Q. B. 349.

COSTS.—1. *No notice of taxing.*—Where judgment has been signed, costs taxed, and execution issued for the amount of debt and costs, without notice of taxation, the Court will not set aside the

judgment or execution, but will direct a review of the taxation. *Field and another v. Partridge*, 21 Law J. (N. S.) Exch. 269.

2. *Security for*.—Security for costs will not be required from a plaintiff who is a foreigner, if he is actually in this country. *Tumbisco v. Pacifico*, 21 Law J. (N. S.) Exch. 276.

COUNTY COURTS ACT.—*Certificate for costs*.—Under the 12th section of the County Courts' Extension Act, 13 & 14 Vict. c. 61, a judge has power to certify for costs where the sum recovered in actions of contract is 20*l.* and in tort 5*l.* *Garby v. Harris*, 7 Exch. 591.

COUNTY COURT.—*Costs—Concurrent jurisdiction*.—Where one of several plaintiffs dwells beyond twenty miles from the defendant, the superior courts have concurrent jurisdiction with the County Court, under the 9 & 10 Vict. c. 95, s. 128, and the plaintiffs will be therefore entitled to costs, under the 13 & 14 Vict. c. 61, notwithstanding less than 20*l.* is recovered. *Hickie and another v. Salamo*, 21 Law J. (N. S.) Exch. 271.

2. *Warrant of commitment—How long in force*.—The 131st general rule made by the County Court judges, under the 12 & 13 Vict. c. 101, s. 12, directs that the warrants of commitment shall bear date on the day on which the order for commitment was made, and shall continue in force for three calendar months, and no longer: Held, that a person arrested under a warrant within three calendar months after its date, may be detained in custody after the expiration of three months. *Hayes v. Keene*, 21 Law J. (N. S.) C. B. 204.

3. *Writ of execution*.—A plaintiff who has recovered a judgment for debt and costs in the County Court, and has received the debt out of court, is entitled to have a writ of execution issued for the costs, and this Court will grant a *mandamus* to the clerk of the County Court, commanding him to issue such writ of execution. *Reg. v. Clerk of County Court of Surrey*, 21 Law J. (N. S.) Q. B. 310.

DISTRESS FOR RENT.—*Sale of goods*.—In case for selling goods distrained for rent without appraisement, the measure of damages is the real value of the goods sold minus the rent due. If a judge at Nisi Prius does not inform the jury what is the proper measure of damages on an issue in which it is admitted that the plaintiff is entitled to a verdict and damages, the Court will direct a new trial, although the point was not taken by the plaintiff's counsel at the trial. *Knight v. Egerton and others*, 7 Exch. 407.

EAST-INDIA COMPANY.—*Obligation to pay*.—There is no legal obligation upon the East-India Company to pay the Commander-in-Chief of the Queen's or of the native forces in India the arrears of pay due to him as such Commander-in-Chief, and a *mandamus* to pay such arrears cannot be granted. *Ex parte Sir C. Napier*, 21 Law J. (N. S.) Q. B. 332.

EJECTMENT.—*Practice—Writ of possession*.—Writs of *habere facias possessionem* in ejectment are within the 3 & 4 Wm. 4, c. 67, s. 2, and are properly made returnable immediately after the execution thereof. *Doe d. Hudson v. Roe*, 21 Law J. (N. S.) Q. B. 359.

EJECTMENT. See **PRACTICE.**

EXCLUSIVE TRIBUNAL. See **ACTION.**

EXEMPTION FROM RATES. See **LIBRARY.**

FACTORY ACT.—*Occupier of mill.*—Held, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that under the Factory Act, 7 & 8 Vict. c. 15, s. 21, the occupier of a mill is only bound to provide a secure fence for the mill gearing and machinery, and to keep up the fence when the parts required to be fenced are in motion for some manufacturing process. Therefore, when the declaration stated that the defendants were the occupiers of a building in which the steam power was used to work machinery employed in manufacturing cotton, and in part of which building there was certain mill-gearing, being a shaft which was worked and put in motion by the said steam power, yet the defendants disregarded their duty in this, that the shaft was not securely fenced, contrary to the form of the statute, whereby the plaintiff received great bodily injury, &c., such declaration was held bad in arrest of judgment, for not showing that at the time of the accident the machinery was in motion for some manufacturing process. *Coe v. Platt and another*, 7 Exch. 460.

HOUSE.—*Ruinous condition.*—There is no implied duty in the owner of a house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation, and no action will lie against him for an omission to do so, in the absence of express warranty or actual deceit. *Keates v. Earl of Cadogan*, 10 C. B. 591.

JOINT-STOCK COMPANY.—1. *Registration.*—A society consisting of more than twenty-five members raised money by subscription amongst its shareholders, and out of the money so raised made loans to its members at interest. Upon such loans premiums also were payable, by monthly instalments, and fines were incurred for default in payments. All the money arising from interest, premiums, and fines, went into the general fund of the society: Held, that the society was not a company established for any purpose of profit within the meaning of 7 & 8 Vict. c. 110, s. 2, and, therefore, that it did not require to be registered under that Act. *Bear and others v. Bromley*, 21 Law J. (N. S.) Q. B. 354.

2. *Shareholder—Execution of deed.*—The Joint-Stock Companies' Registration Act, 7 & 8 Vict. c. 110, by section 51, enacts that on demand of the holder of any share the company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder, and by section 3 the word 'shareholder' is to mean any person entitled to a share in a company, and who has executed the deed of settlement, so far as such meaning is not excluded by the context or the nature of the subject-matter: Held, that a holder of shares in a joint-stock company, who has not executed the deed of settlement, is not entitled to a certificate under section 51. The declaration alleged that the defendants were a completely registered

company, formed under a deed of settlement, and that the plaintiff became a subscriber for shares, to be received by him as soon as the defendants were completely registered and had paid the deposits upon such shares, and that after the complete registration of the defendants the plaintiff duly executed the said deed of settlement, except as to a certain provision therein, numbered 179; and that, by virtue of the premises and of the statute, the plaintiff was entitled to have made out by the defendants a certificate of the proprietorship of the said shares so subscribed for by the plaintiff as aforesaid; and alleged as a breach, that the defendant refused to deliver to him such certificate. The plea alleged that the plaintiff had not executed the deed of settlement: Held (on demurrer to the plea), that the declaration showed no cause of action, as it must be taken to omit any allegation that the plaintiff had executed the deed of settlement. There can be no such thing as a partial execution of a deed. *Wilkinson v. Anglo-Californian Gold-mining Company*, 21 Law J. (N. S.) Q. B. 327.

JUDGMENT IN CASE OF NONSUIT.—*Insolvent Act.*—A defendant is not entitled to judgment as in case of a nonsuit, where the plaintiff, after issue joined, has taken the benefit of the Insolvent Act, and inserted in his schedule the debt for which the action is brought, but it does not appear whether the assignees are willing to proceed. *Gavin v. Allan*, 7 Exch. 306.

JURISDICTION. See **UNIVERSITY**.

LEASE.—*Action—Debt.*—In debt for rent on an indenture, with a plea of *non est factum*, the plaintiff is entitled to recover on production of a deed bearing a counterpart stamp, and on proof of its execution by the defendant, without going on to prove the execution of a lease by himself. *Hughes v. Clark*, 10 C. B. 905.

LEGACY-DUTY.—*Power to charge estate with annual sum in lieu of dower.*—A special verdict stated that J. Lord H., by his will, directed the purchase of estates in Suffolk to be made with the proceeds of his estates in Essex. The will contained a clause with a power enabling the tenant for life who should be entitled to the rents of the estates, to direct them to be sold and a deed of settlement to be made of them, and that there should be inserted therein a power that the tenant for life should be entitled to the rents, and should have power to charge such estates with an annual sum not exceeding one-third part of the annual value for the benefit of any woman he might marry. The testator having died, was succeeded by his son, J. M. Lord H., who charged the Suffolk estate with the payment of 2,000*l.*, free of taxes and other deductions, for the benefit of his wife, for her life; the said sum to be in the nature of and in full for her jointure, and to be in bar, lieu, and satisfaction of and for her dower or thirds, &c. The will then provided that, in the event of the testator not being authorized to charge the estates with so large a sum as 2,000*l.*, his other estates should be liable to supply the deficiency. The defendant was in possession of the estates, and was

the heir of the second testator, J. M. Lord H., who was the surviving trustee of the first testator. No deed of settlement was ever executed: Held, that this could not be considered as a purchase of the dower or thirds, but was an appointment of the legacy, which was taken as a gift of the testator, and that the legacy-duty was payable upon the interest of one-third of the value of the rent of the Suffolk estates, to be ascertained on the death of the testator. *Quære*, if this had been a condition annexed to the legacy by the second testator, whether the whole of the money received by the legatees would have been a legacy, or whether a part of it would have been a purchase of some interest that might reduce the duty to be paid upon the legacy. *The Attorney-General v. Lord Henniker*, 21 Law J. (N. S.) Exch. 298.

LESSEE.—Covenant to pay rates.—Where a lessee covenants to pay rates and taxes, no demand is necessary to constitute a breach, so as to entitle the lessor to avail himself of the proviso for re-entry. *Davies v. Burrell and Lane*, 10 C. B. 821.

LIBRARY.—Exemption from rates.—A society, called "The London Library," was established for the purpose of lending books to its members, being supported in part by annual subscriptions, and in part by the voluntary contributions of its members, and precluded by its laws from making any dividend, gift, division, or bonus in money to or between any of its members: Held, that such society, being duly certified under the 2nd section of the 6 & 7 Vict. c. 36, was exempted from rates, &c., under sec. 1. But where portions of the premises leased by such society were under-let to other scientific bodies: Held, that it was not such an exclusive occupation of the premises for the purpose of the society as to entitle it to the exemption. Where upon appeal to the Quarter Sessions under this statute a case is stated for the opinion of one of the superior courts, under the 12 & 13 Vict. c. 45, s. 11, costs are taxed as between party and party.—*Earl of Clarendon and others, appellants; the Parish of St. James, Westminster, respondents*, 10 C. B. 806.

LIMITATION OF LIABILITY. See CARRIERS BY RAILWAY.

MASTER OF VESSEL.—Repairs—Sale of goods.—Where the master of a vessel sells part of a shipper's goods at an intermediate port, in order to raise money to provide for the repairs or other expenses of the vessel, which are necessary to enable him to prosecute and complete the voyage, and the vessel does not arrive at her port of destination, the shipper is not entitled to receive the clear value for which the goods would have sold at that port. A declaration in *assumpsit* stated that the defendant was the owner of a certain ship, then at a certain foreign port, and bound from thence to the port of London, in Great Britain, and that the plaintiff caused certain goods of his to be shipped on board the ship, to be conveyed to London, for certain freight; that the ship set sail, and on her voyage was much injured by tempestuous weather, and that the master was obliged to put into an intermediate port to have her

repaired ; and that for the purpose of such repairs, and to pay them, and to enable the ship to leave that port, it became necessary for the master to raise a sum of money ; and that without doing so, the ship would have been unable to leave the port, or to proceed to sea ; and that, because the master could not otherwise raise the amount necessarily required, he sold certain of the plaintiff's goods, and with the amount so realized he paid the expenses of the repairs, &c. The declaration then stated, that the defendant, in consideration of the premises, promised the plaintiff to pay him the value for which the goods would have been sold if they had been delivered by the defendant to the plaintiff at London. Plea to the declaration, so far as the same claims to recover damages to a greater amount than the value of the ship and freight, thereafter mentioned, that the plaintiff ought not to maintain his action to recover any damages to a greater amount than aforesaid, because after the goods were shipped, and before any part thereof had been conveyed to the port of L., and whilst they were in the custody and under the control of the master, the master wrongfully, and without any authority in that behalf from the defendant, and without his knowledge, privity, or consent, sold the goods ; and the defendant thereby was unable to deliver them to the plaintiff ; and that at the several times the defendant was the owner of the ship, being a British vessel, and duly registered, that the goods were shipped by being received into the custody of the master, and that the defendant never personally accepted or received, nor did he interfere with them or the shipping, or the sale, except as such owner of the vessel ; and that the shipping and the sale took place after the 1st September, 1813, and that the ship, together with the value of the freight due, or to grow due during the voyage, did not exceed a certain sum (named). Verification and prayer of judgment. Held, first, that the declaration was bad in substance ; and, secondly, that the plea was bad as being pleaded to the damages merely. *Semble*, also, that the plea did not disclose any defence under the 53 Geo. 3, c. 159, upon which it professed to be founded.—*Atkinson v. Stephens*, 7 Exch. 567.

MUNICIPAL CORPORATION.—*Disqualification of Councillor.*—By sec. 28 of the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, no person is qualified to be elected a councillor during such time as he has any share or interest in any contract or employment with, by, or on behalf of the council : Held, that a party who had entered into an existing contract for profit with the council was disqualified, although, by reason of its not being under seal, he could not have sued the corporation upon the contract. By 7 Wm. 4 & 1 Vict. c. 78, s. 23, all applications for a *quo warranto* to question the election of corporate officers are to be made before the end of twelve calendar months after the election, or the time when the person against whom the application is made, shall have become disqualified : Held, that when a party had entered into a continuing contract with the council, the disqualification continued during the existence of the contract, and that *quo warranto* might be applied

for, notwithstanding more than twelve months had elapsed from the time of the election, or from the time when the disqualification first attached. *Reg v. Francis*, 21 Law J. (N. S.) Q. B. 304.

NEGLIGENCE. See ATTORNEY OF MORTGAGEE.

NONSUIT.—*Issue joined*.—Issue was joined in 1844; the Court in 1851 discharged with costs a rule or judgment as in case of a nonsuit. *Dixon v. Roper*, 10 C. B. 918.

PLEA.—*Nul tiel record*.—Where to a plea of *nul tiel record* the plaintiff replies *tiel record*, a two days' notice that he will produce the record is sufficient. *Maguire v. Kinaird*, 7 Exch. 608.

PLEADING.—1. *Action on promissory note*.—Declaration on a promissory note made by the defendant. Plea, that the defendant being indebted to the plaintiff, and a prisoner for debt, duly, and according to the provisions of the statute in that behalf, petitioned the Court for the Relief of Insolvent Debtors for his discharge from custody; which petition was duly filed in the said court, and all the estate of the defendant afterwards duly vested in the provisional assignee, and a schedule of his debts and effects was delivered and filed in the said court, containing a description of the debt of the plaintiff; that the said Court did thereupon appoint a day for the defendant being brought up to be dealt with according to the said Act; that the plaintiff threatened to oppose the defendant's discharge, unless the defendant would deliver to the plaintiff promissory notes for the amount of the debt due to the plaintiff; and thereupon, in order to induce the plaintiff to abandon his threat, and not to oppose the defendant's discharge, the promissory note in the declaration mentioned was given; that the defendant was afterwards, by an order of the said Court, duly discharged of and from the said debt so due to the plaintiff, and in respect whereof he had made and delivered the said note, which discharge still remained in full force. Upon demurrer, the Court was of opinion that the plea was open to the objection of duplicity, and the defendant had leave to amend. *Heseltine v. Siely*, 21 Law J. (N. S.) Q. B. 305.

2. *Prescription—Canal Act*.—Under a Canal Act, mill-owners within a specified distance of the canal were entitled to use the water for the purpose of condensing the steam used for working their engines. In an action against such a mill-owner, the declaration charged that he abstracted more water than was sufficient to supply the engine with cold water for the purpose of condensing the steam, and that he applied the water to other and different purposes than condensing steam. The plea alleged an user by the defendant, as occupier of the mill in the declaration mentioned, of the water, as of right and without interruption for twenty years, for other purposes than condensing steam; to wit, for the purpose of supplying the boiler of the engine, and of generating steam for working the engine, and of supplying a certain cistern, to wit, a cistern on the roof of a certain engine-house. The replication traversed the user as alleged in the plea. The evidence was, that the defendant was the occupier of

two mills adjoining to each other, and occupied together, each having a separate steam-engine. The old mill was erected in 1823, since which time the defendant had used the water from the canal for twenty years, for the purposes mentioned in the plea in respect of the old mill. The new mill was built in 1829, and the water had been used as alleged in the plea for less than twenty years in respect of the new mill. There was no cistern on the roof of any engine-house, but there were various cisterns in and about the engine-house in the old mill, through which the water passed. The jury found that the two buildings formed one mill, and that there had been a twenty years' user as of right by the defendant: Held, that the issue was divisible, and that the defendant was entitled to have the verdict entered for him, except as to the supplying a cistern on the roof of the engine-house, as to which the plaintiff was entitled to enter a verdict, with nominal damages: Held also (upon motion for judgment *non obstante veredicto*), that the plea was bad, as the canal company had no right to grant the water for other purposes than for condensing steam, and that no such right could consequently be inferred from a twenty years' user by defendant. *The Company of Proprietors of the Rochdale Canal v. Reidcliffe*, 21 Law J. (N. S.) Q. B. 297.

POWER TO APPOINT. See ANNUITY, 2.

PRACTICE.—*Service of declaration in ejectment*.—Service of a declaration and notice in ejectment upon one of two joint tenants, the notice being addressed to that one only, is not sufficient. *Doe d. Braby v. Roe*, 10 C. B. 663.

PRINCIPAL AND AGENT.—*Undertaking by attorneys*.—A sale of certain property seized by the assignees of a bankrupt being about to take place, the plaintiff gave notice to the assignees of a claim to a portion of the property under a bill of sale by way of mortgage; and thereupon, the defendants, who were the attorneys of the assignees, on the 26th of August, wrote to the plaintiff's attorney a letter, stating, that in consideration of the plaintiff consenting to the sale, they thereby, on behalf of the assignees, consented the net proceeds of effects included in the bill of sale should be paid over to the plaintiff to the extent of the balance due for principal and interest. This letter was written by authority of the trade assignee, who had the management of the sale of the bankrupt's effects, but without the authority of the official assignee: in answer to which the plaintiff's attorney the next day wrote, saying, that "in compliance with the undertaking given by you herein," he, on behalf of the plaintiff, consented to the sale. The sale took place; and on the 2nd of December, the defendants wrote again to the plaintiff's attorney, referring to the former letter of the 26th, and stating, that unless informed within two days of the course the plaintiff intended to pursue, "we shall consider ourselves absolved from our promise, and shall contest the validity of the bill of sale." Held, first, that as the letter of the 26th and 27th of August constituted a complete contract, the subsequent letter of the 2nd of December could not be

looked at in construing such contract; and that the contract, upon the face of it, showed that the defendants contracted merely as agents. Secondly, that the defendants had no authority to bind the official assignee to the undertaking. Thirdly, that although the defendants had no such authority, still they were not liable to be sued in an action upon the contract as principals. *Lewis v. Nicholson and another*, 21 L. J. (N. S.) Q. B. 312.

PRIVILEGE. See ARREST.

PROMISSORY NOTE. See BILL OF EXCHANGE.

RAILWAY COMPANY.—*River—New course.*—A declaration in covenant recited a deed of the 2nd March, 1841, whereby two pieces of land were conveyed to the defendants, subject to the performance by them of certain agreements. In this deed the piece of land in question was described as a slip of land, then being intended to be formed into a new course for the river Beult. The declaration then made profert of the deed of covenant upon which the action was brought, and stated that defendants thereby covenanted with the plaintiffs that they, the defendants, should and would, within a reasonable time, at their own costs and expense, make and cut the said intended new course for the said river Beult, and also, within such like reasonable time as aforesaid, divert the stream of the said river into the said intended new course for the same. It then went on to state a covenant to make a bridge over the intended new cut for the plaintiffs' use within a given time, and a covenant to make good the banks of the new cut, and after the same should have been so made good, and the railway completed, to reconvey to A., one of the plaintiffs, the slip of land which should form the new course of the river, and also to fill up and level the then existing course, so far as the same should have been diverted. The declaration then charged breaches of covenant in not making a new cut, in not diverting the stream of the Beult, in not constructing a bridge over the new cut, in not perfecting its banks, in not reconveying to A. the slip of land, with the water of the said river duly diverted into the said new course, and in not filling up the existing course of the Beult, so far as the stream thereof should and ought to have been diverted as aforesaid. The defendants, after craving oyer of the deed of covenant, and setting it out *in hæc verba*, demurred generally to the declaration: Held, that there was no implied covenant on the part of the defendants to make the cut, and divert the stream of the Beult, and, consequently, that there could be no breach of the express covenants to build the bridge, &c., unless the cut was made and the stream diverted. *Rashleigh and another v. The South-Eastern Railway Company*, 10 C. B. 612.

RAILWAY FENCES. — *Liability to maintain.* — Where the plaintiff's sheep, trespassing on A.'s close, strayed upon the defendants' railway, which adjoined, through a defect of fences, which the defendants were bound, as against A., to make and maintain, and were killed: Held, that the plaintiff could not recover either at com-

mon law or under the Railway Clauses' Consolidation Act, 1845 (8 & 9 Vict. c. 20, s. 68), or on the ground that the defendants exercised a dangerous trade; the obligation to make and maintain fences, both at common law and by the statute, applying only as against the owners or occupiers of the adjoining close. *Ricketts v. East and West India Docks and Birmingham Railway Company*, 21 Law J. (N. S.) C. B. 201.

REPLEVIN. — *Tithe Commutation Act* — *Verbal agreement to let tithes free.* — Avowry that the plaintiff was tenant to the defendant, at a rent of 400*l.* a year. The plaintiff being the owner of a farm, and lessee of the tithe commutation rent-charge under the dean and chapter of W., at a rent of 60*l.* a year, let the land verbally to the defendant at a rent of 400*l.* a year tithe free: Held, that as by the 80th section of the Tithe Commutation Act, 6 & 7 Wm. 4, c. 71, in the event of the defendant distraining for the tithe-rent, he would be compelled to allow the same to the plaintiff in account; the plaintiff was tenant to the defendant at a rent of 400*l.*, and therefore that the avowry was proved. *Meggison v. Bowes*, 21 Law J. (N. S.) Exch. 284.

RULE TO COMPUTE. — *Three defendants* — *Service on attorney of two of them.* — In an action by an indorsee against three defendants as acceptors of a bill of exchange, who have suffered judgment by default, service of the *rule nisi* to compute on the London agent of the attorney of two of the defendants, is a sufficient service to justify the Court in making the rule to compute absolute. *Ettison (public officer) v. Wood and others*, 21 Law J. (N. S.) Q. B. 317.

RUINOUS CONDITION. See HOUSE.

SMALL DEBTS ACT. — *Tenders.* — It is no ground for suggestion under the London Small Debts Act, 10 & 11 Vict. c. lxxi. s. 113, that the debt has been reduced below 20*l.* by a payment into the court under a plea of tender. *Crosse v. Seaman*, 10 C. B. 884.

STATUTE — *Construction of* — *Railway company.* — It being proposed to form a railway from A. through A. and G. to B., and it being known that the line when open from A. to A., would compete with and injure the A. Canal; and when open from A. to G. would in like manner compete with and injure the G. Canal, a private Act of Parliament (9 & 10 Vict. c. clx) was obtained, which authorized the formation of the whole railway from A. to B., and which stated that it was intended that the canals and railway should be worked in connection, and that the canal companies should be incorporated with the railway company. Section 73 provided that the railway company should be liable to pay to the canal companies a specified price per share for all their shares, from and immediately after the opening of the railway between A and G. for public use. The railway was afterwards made and opened for a portion only of the space from A. to B., namely from A. to G. Held (*Williams, J., dissentiente*), that the opening for public use of any portion of the line between

A. and G. rendered the railway company liable to pay for the canal shares. *The Grantham Canal Company v. The Ambergate, Nottingham, and Boston, and Eastern Junction Railway Company*, 21 L. J. (N. S.) Q. B. 322.

STATUTE OF LIMITATIONS. See PURCHASE.

TRESPASS.—*Locus in quo*.—In actions for trespass to land, the *locus in quo* should be designated by abutments or other description, as it was at the time of the trespass, and not at the time of declaration. Therefore, where in an action by a reversioner, the declaration described the *locus in quo* as abutting on the south and east, on a close in the occupation and possession of the defendants, and the defendants (a railway company) pleaded that they took possession of part of the said close abutting on the south on the fence of their railway, under the provisions of 8 & 9 Vict. c. 20, ss. 32, 33, which was the trespass complained of; and it appeared at the trial that at the time the trespass was committed the close in question abutted on the fence of the railway, but that afterwards the defendants took possession of and purchased, under the provisions of the above Act, a small part of it adjoining the railway, so that the plaintiff's description was correct at the time of declaration, but not at the time of the trespass: Held, that the plaintiff could not recover, for want of a new assignment. *Humfrey v. The London and North-Western Railway Company*, 7 Exch. 325.

•TOWN CLERK.—*Compensation—Borough rates*.—The council of the borough of Lichfield, previously to making a borough rate; made an estimate under the 5 & 6 Wm. 4, c. 76, s. 92, which estimate contained (amongst others) the two following items: "Compensation to the late town-clerk, three years and a half, 105*l.* 14*s.* 10*d.*; law expenses, 800*l.*" The first of these items was, as it expressed, an award of compensation to a former town-clerk who had been dismissed from his situation by the corporation. The second item had been included in the estimate, to meet the demand of the attorney to the corporation for costs and disbursements. The attorney had paid the sum of 467*l.* to a party, to save the corporation from an execution; and this sum was one of the items included in the charges as a disbursement. At the time the estimate was made the attorney had not delivered any signed bill of the costs of the corporation. The council afterwards made a borough rate, which included the sum so mentioned in the estimate. At a meeting, which was not a public one, the borough council made an order which directed the overseers of certain parishes within the borough to pay the proportions assessed upon their parishes out of the poor-rates made and collected; and they also issued a warrant to their treasurer, commanding him within 100 days from the date thereof to demand from the overseers the said proportions. The treasurer issued his precept to the overseers, requiring them within 100 days after the receipt thereof, to pay the proportions out of the poor-rates made and collected, or to be made and collected. A warrant was issued by the defendants, one of whom

was the Mayor of Lichfield, and both justices of the borough, against the overseer, who had not paid the proportion assessed in his parish. This warrant contained the venue in the margin, and directed a certain sum to be levied by distress of the plaintiff's goods, and provided, that "if within the space of five days next after such distress by you taken, the sum of, &c., shall not be paid, then you do sell the said goods;" and concluded thus: "Given under our hands and seals, and under the corporate seal of the said borough and city, T. T. (L. s.), justices of the said borough and city. Thomas (corporation seal) Johnson, mayor." The defendant Johnson was not stated in the body of the warrant to be mayor of the borough: Held, in error, by the Court of Exchequer Chamber, first, that the rate was valid, as a borough rate need not be made in public. Secondly, that the items of 105*l.* and 800*l.* could not be considered as bygone expenses, so as to make the rate retrospective with regard to them, as the questions relating to the first item were under litigation at the time of the making of the rate; and that as to the second item, the council were justified in treating such expenses as not actually incurred before the delivery of the solicitor's bill; and as the rate was good upon the face of it, and the overseer (the plaintiff) had not appealed against it, he could not object to it, as against the defendants. Thirdly, that the variance between the precept of the treasurer and the warrant of the mayor as to the time of payment, was immaterial, and at all events, that the plaintiff could not complain of it, as he had thereby a further time for payment given him. Fourthly, that the plaintiff was liable to have his goods seized as a distress, although he was out of office before the distress warrant was executed, as he was the offender under the 55 Geo. 3, c. 51, which provides, that the offender's goods should be seized, and gives the existing overseers power to make a rate to reimburse him. Fifthly, that the fact of the warrant of distress being under the hands and seals of the two defendants, as justices, did not prevent the warrant of one of them, as mayor, the warrant having his signature and the corporate seal attached to it. *Jones v. Johnson and Morgan*, 7 Exch. 452.

TROVER.—*Notice of act of bankruptcy.*—A bankrupt, previously to his bankruptcy, deposited timber with the defendants, who were wharfingers, to be kept at their wharf and delivered on payment of the wharfage. On the 7th of February, 1848, a fiat issued against him, and the plaintiff Cannan was appointed official assignee. The bankrupt, after the first fiat, sold the timber, and between September 1848, and January 1849, it was delivered to the purchaser by the defendants, who had no notice of the bankruptcy. In February, 1849 the other plaintiffs were appointed trade assignees. In trover by the official and other assignees: Held, first, that the defendants were not liable for the value of the timber, being protected by the 6 Geo. 4, c. 16, s. 84. Secondly, that the issuing of the fiat was not notice to all the world of its issuing, the fiat not standing on the same footing as the old commission of bankruptcy. The words in the 84th section, "goods belonging to any bankrupt," mean goods which belonged to

the bankrupt at the time they were deposited in the possession or custody of the person delivering them, and which would have continued to be his property unless an act of bankruptcy had occurred. *Quære*, whether there was a variance between the declaration and the facts stated, on the ground that the official assignee was to be considered as alone possessed of the timber at the time of the conversion, and not the trade assignee. *Cannan and others, assignees of Nash, v. The South-Eastern Railway Company*, 21 L. J. (N. S.) C. B. 257.

UNIVERSITY.—*Cambridge—Jurisdiction—Discommuning.*—The Vice-Chancellor and heads of the colleges in the University of Cambridge have authority to make a decree that every tradesman with whom any person *in statu pupillari* should contract a debt exceeding 5*l.*, should be required to send notice thereof at the end of every quarter, to the college tutor of the person so indebted, on pain of being punished, by discommuning or otherwise, as to the Vice-Chancellor and heads of colleges should seem fit. Where a tradesman resident in Cambridge, who has violated this decree, is summoned to appear before the Vice-Chancellor and heads of houses to answer the complaint, he is not entitled to appear by counsel or attorney, as upon a judicial proceeding. Upon proof that the tradesman had violated the above decree, it was ordered by the Vice-Chancellor and heads of colleges, that no person *in statu pupillari* should contract, &c., or have any tradings or dealings with the said tradesman, and that if any person *in statu pupillari* should disobey this decree, he should be punished by suspension, rustication, or expulsion, as the case should appear to the Vice-Chancellor and heads of colleges to require: Held, that there was no ground for a prohibition of the proceedings. *Ex parte Death*, 21 L. J. (N. S.) Q. B. 337.

WARRANTY.—*Sale of goods.*—Upon a contract for the sale of goods with a particular express warranty, the Court will not extend such warranty by implication. The declaration stated a bargain for the sale by the defendants to the plaintiff, of a certain cargo, to wit, the cargo of Indian corn then shipped at Orfano, on board the *Ottoman*, at a certain price, including freight and insurance, to Cork, Liverpool, or London; and that it was agreed that the quality of the said Indian corn was equal to *that* of the shipment of that article in the season of 1847, and that the said Indian corn had been shipped in good and merchantable condition; and alleged for breach that the corn was not, at the time of shipment, or at any other time, in good and merchantable condition, or in a fit and proper condition for the performance of the voyage from Orfano to Cork, &c. The judge left it to the jury to say whether the corn was, at the time of shipment, in a good and merchantable condition for a foreign voyage: Held, a misdirection, inasmuch as it was extending by implication the express warranty contained in the contract. *Dickson v. Yizinia and another*, 10 C. B. 602.

WITNESS.—*Commission to examine.*—It is discretionary with the Court to grant a commission to examine parties to an action resident

abroad, under the 1 Wm. 4, c. 22, s. 4, and the Court will do so only where it appears from the affidavits in support of the application, to be conducive to the due administration of justice. *Castelli v. Groome*, 21 L. J. (N. S.) Q. B. 308.

WORK AND LABOUR.—*Special contract*.—*Action by administrators.*—A special contract was entered into by B. to do the whole of certain work for G., for a stated sum. Before the completion of the work B. died, and an arrangement was then come to between G. and C., under which C. on his account completed the portion of the work left unfinished at B.'s death. C., who afterwards became administrator of the effects of B., sued G. on the common *indebitatus* counts for the proportion of the work done by B., alleging that G. was indebted to B. in his lifetime, and was liable to pay B. on request: Held, that although the special contract was to be considered as rescinded by the arrangement between C. and G., still that the above form of declaration was not supported. *Crosthwaite, administrator of Barrow, v. Gardner*, 21 Law J. (N. S.) Q. B. 356.

WRIT OF TRIAL.—*Irregularity.*—In an action in which two issues were joined, the writ of trial directed the trial of the issue—not issues. The defendant, on the case coming on for trial, objected that the writ was irregular; but the objection being overruled, he did not appear at the trial, and a verdict was found for the plaintiff. The Court refused to set aside the writ of trial, or to arrest the judgment for the irregularity. *Watson v. Humphries*, 21 L. J. (N. S.) Q. B. 336.

CRIMINAL AND MAGISTRATES' CASES.

CONTAINED IN

21 Law Journal (N. S.), parts 10 and 11.

BASTARDY ORDER.—*Appeal.*—Justices at petty sessions after verbally adjudging B. to be the putative father of twin bastard children, and ordering him to pay 1s. per week for the maintenance of each, drew up a separate order in respect of each child. B. gave notice of appeal, and entered into a separate recognizance to prosecute in each case. One notice of recognizance only was served on the mother by the attorney of B., and it stated, "We hereby give you notice that B. has entered into a recognizance to try an appeal, &c.,

against an order of affiliation made on, &c., whereby B. was adjudged to be the father of two bastard children, of which J. J. had then lately been delivered." It was objected that the notice was insufficient, as there was no such recognizance as that stated in the notice, and no such order as an order adjudging B. to be the father of two children: Held, that the notice of recognizance was sufficient, as, putting a reasonable construction upon it, it gave the mother sufficient information that B. had entered into recognizances to appeal in respect to each child. *Reg. v. The Recorder of Leeds*, 21 Law J. (N. S.) M. C. 171.

CERTIORARI. See INDICTMENT.

CONFESSION. See EVIDENCE.

EVIDENCE.—*Confession—Inducement—Person in authority.*—The prisoner, who was a maid-servant, was indicted for the murder of an infant, of which she had recently been delivered. A surgeon had been sent for to attend her, but before he came her mistress told her she had better speak the truth: in answer, she said she would tell it to the surgeon, and when he came, she, in the presence of her mistress, made a confession to him, which was offered in evidence: Held, that as the husband of the mistress was not the prosecutor, and as the offence was not in any way connected with the management of the house, the mistress could not be considered as a person having authority over the prosecution, and therefore the inducement held out by her did not affect the admissibility of the evidence. *Reg. v. Hannah Moore*, 21 Law J. (N. S.) M. C. 199.

HIGHWAY—*Indictment of parish for non-repair of—Order for preferring indictment.*—An indictment for non-repair of a highway was preferred by G. against the parish at the Quarter Sessions, in pursuance of an order of three justices at a special sessions for highways. The parish pleaded, and the jury found that the occupier of farm A. was liable to repair *ratione tenuræ*. G. applied for his costs of the prosecution under section 95 of the statute 5 & 6 Wm. 4, c. 50, but the Sessions refused to give them, on the ground that G., one of the magistrates who made the order for preferring the indictment, was the owner of farm A. Before the order was given, G. had summoned the surveyor of the parish before the special sessions. No question was made that the road was a highway and out of repair. The surveyor simply denied the liability of the parish to repair it, but suggested who was liable, and thereupon L. and the two other justices signed the order: Held, that when the surveyor of the parish simply denies the liability of the parish to repair a highway within it which is out of repair, it is imperative on the special sessions, under section 95 of the Highway Act, to order an indictment to be preferred: Held, further, that the order for preferring the indictment was valid in this case, as L. was not interested in the matter at the time the order was made, though he became so after the parish had pleaded; consequently, that G. was entitled to his costs of the

prosecution. *Reg. v. The Justices of Surrey*, 21 Law J. (N. S.) M. C. 195.

HIGHWAY-RATES.—*Borough of Ashton-under-Lyne.*—By the Ashton-under-Lyne Improvement Act, 12 & 13 Vict. c. 85, s. 25, power is given to the mayor, aldermen, and burgesses, to make and levy a highway-rate upon the occupiers of all messuages, houses, &c., lands, tenements, and hereditaments within the borough, for maintaining and repairing the present highways within the borough, when sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the mayor, &c., and such of the present and future streets as shall from time to time be declared public highways as aforesaid, and the main sewer under the same." The borough of Ashton-under-Lyne consists of a part of four divisions of the parish of Ashton-under-Lyne and the whole of another of such divisions, the latter being subdivided into two districts, and before the passing of the above Act each of such districts separately maintained its own highways, and had its own surveyor. The greater part of one district was a country district. After the passing of the said Act, the mayor, &c., acting as surveyors, laid a rate on the rateable property within each of the said districts, exclusively for the repairs of such highways within them as had not been sewered, drained, levelled, paved, and flagged, and otherwise completed to the satisfaction of the mayor, &c.: Held, that under the above section of the special Act, taken in connection with sections 48 and 49 of the Towns' Improvement Clauses Act, 10 & 11 Vict. c. 34, the mayor, aldermen, and burgesses of the borough were empowered to make two general rates within the borough, one for the repair of the urban streets within the 25th section of the special Act, and the other for the repair of the rural ways not within that section; and therefore that the rate in question was bad. *Reg. on the prosecution of the Mayor, &c., of Ashton-under-Lyne v. Slater*, 21 Law J. (N. S.) M. C. 185.

INDICTMENT.—*Removal—Certiorari.*—Upon removal of an indictment by *certiorari* from the Sessions to the Queen's Bench, the sureties in the recognizance become bound as sureties for the payment of the costs in the event of a verdict being found for the Crown, although there are no words to that effect in the conditions to the recognizance; the 3rd section of the 5 & 6 Wm. & M. c. 11, being in effect incorporated with the recognizances. The recognizance was stated to have been entered into before J. T., Esq., one of the justices for the county of, &c.: Held, good. *Reg. v. Hodgson*, 21 Law J. (N. S.) M. C. 181.

INDICTMENT. See **HIGHWAY.**

INDUCEMENT. See **EVIDENCE.**

LANDS CLAUSES' CONSOLIDATION ACT.—*Compensation—Order of justices.*—The 11 & 12 Vict. c. 43 (which did not come into operation until six weeks after its passing), by section 11, provides, that where no time is limited for making complaints or laying informations under Acts of Parliament, such complaint shall be

made and such information laid within six calendar months from the time when the matter of such complaint or information arose: Held, that an order of two justices, under the 8 Vict. c. 18, awarding compensation for damage done to a landowner, by the construction of a railway, was within the above clause of the 11 & 12 Vict. c. 43: Held, also, that the above section had a retrospective operation, and invalidated such an order where the complaint was not made within six calendar months from the time when the damage complained of occurred, although the order itself was made more than six months before the passing of the 11 & 12 Vict. c. 43. *Reg. v. Leeds and Bradford Railway Company*, 21 Law J. (N. S.) M. C. 193.

PAUPER LUNATIC.—*Maintenance.*—The 12 & 13 Vict. c. 108, s. 5, extends to the maintenance of a pauper lunatic born in Ireland, who has acquired no settlement in England, but who has become irremovable by reason of five years' residence in a parish within a union in England, and in such a case the burthen of maintaining the pauper in an asylum is cast upon the common fund of the union. *Reg. v. Arnold*, 21 Law J. (N. S.) M. C. 180.

PAVING RATE.—*Waterworks company.*—By the 40th section of the local Act, 11 Geo. 3, c. xii. the commissioners appointed by the Act were empowered to make rates upon all persons who shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, cellar, vault, or other tenements or hereditaments within the streets, squares, &c., of a certain district, such rates not to exceed, in any one year, the sum of 1s. 2d. in the pound of the yearly rate or yearly value of such of the said lands, houses, shops, warehouses, cellars, vaults, or other tenements or hereditaments respectively, as shall be situate in any of the said streets, squares, &c.; the greater part or parts of which said streets, &c., respectively, shall be actually begun to be paved with new or other stones of a flat surface; and not exceeding 9d. in the pound of the yearly rents or yearly value of such of the said lands, &c., respectively, as shall be situate in any of the streets, squares, &c., which shall be actually begun to be new paved, the footways whereof shall be constructed with new or flat stones, and the carriage-way whereof with the old stones, which shall be taken up in the same or any other of the said streets, squares, &c.; and not exceeding 6d. in the pound of the yearly rents or yearly value of such of the said lands, &c., as shall be situate in any of the said streets, squares, &c., which shall only be repaired by virtue or in pursuance of this Act. The occupiers of houses situate at the corner of paved streets were made liable, by a special provision, to half of the rate only; and the Act also contained special provisions as to the rating of public buildings and other specified property, but which had no express reference to the pipes and other property of a company for the supply of water. The commissioners were empowered, by section 22, to alter the situation of the water-pipes, &c., throughout the district: Held, that, under the 40th section, an incorporated waterworks company was rateable in respect of mains, pipes, and other

apparatus laid down within the district of the commissioners. *Reg. v. East London Waterworks Company*, 21 Law J. (N. S.) M. C. 174.

PERSON IN AUTHORITY. See EVIDENCE.

SESSIONS.—*Interested justice*.—Upon the trial of a parish appeal, F. S., one of the justices, who was a rated inhabitant of the appellant parish, was on the bench during the hearing, and in the course of the proceedings referred the chairman of the Quarter Sessions to some of the documents put in evidence. Upon an observation being made that he was a party interested, F. S. stated that he should take no part in the decision, but he remained in court until the final decision, which was in favour of the appellants. It was sworn that he did not vote or give any opinion upon the question at issue, nor did he influence the decision of the other justices present, and that if he had not believed that the parties were satisfied with his assurance that he would take no part, he would have retired from the court during the trial: Held, that, under the above circumstances, the order of Sessions was invalid, by reason of the presence of the interested justice: Held, also, that notice of an intention to move for a *certiorari* under 13 Geo. 2, c. 18, s. 5, was properly served on F. S., as a justice by and before whom the order of Sessions was made. The notice stated that application would be made for a *certiorari*, on behalf of the inhabitants of the respondent parish, and was signed "J. M., attorney for the inhabitants of the respondent parish." Held, to be sufficient. *Reg. v. Justices of Suffolk*, 21 Law J. (N. S.) M. C. 169.

SETTLEMENT BY JOINT TENANT.—*Renting by tenement—Payment of rates—Construction—Assessment*.—William Atkinson occupied a separate and distinct dwelling-house and farm, in the parish of H., which were let to him and his father, Thomas Atkinson, as joint tenants, the rent and value of the land itself being sufficient to confer a settlement on both. The father resided on another farm at a distance, but he, *bonâ fide*, paid the rent of the farm occupied by his son. In the rate-books of H., Mr. Atkinson appeared as the name of the occupier of the house and farm in respect of two rates, and in a third rate the name of Thomas Atkinson appeared. The overseers had demanded and received payment of these rates from the father: Held, that the Sessions were justified in finding, first, that there was a sufficient occupation and payment of rent, as well as a sufficient assessment to and payment of rates, to confer on William Atkinson a settlement in H., under the 1 Wm. 4, c. 18, and 4 & 5 Wm. 4, c. 76; and secondly, that he had sufficiently been charged with and paid his share of the public taxes to gain a settlement in H., under the 3 & 4 Wm. & M. c. 11. *Reg. v. The Inhabitants of Huthwaite*, 21 Law J. (N. S.) M. C. 189.

WATERWORKS COMPANY. See PAVING-RATE.

BANKRUPTCY.

CONTAINED IN

1 De Gex, McNaug. & Gord., part 1; 21 Law Journal (N. S.) part 11.

ADJUDICATION OF BANKRUPTCY.—*Petition to annul jurisdiction of commissioner.*—A petition to annul an adjudication after advertisement in the *Gazette* must be presented to the Vice-Chancellor sitting in bankruptcy. After the advertisement the commissioner has no jurisdiction to entertain a petition to review his adjudication (stat. 12 & 13 Vict. c. 10, ss. 12, 104, 233). *In re Carter*, 21 Law J. (N. S.) Bank. 23.

ANNULING ADJUDICATION. See BANKRUPT LAW CONSOLIDATION ACT, 1.

BANKRUPT.—1. “*Further protection*”—*Refusal.*—The commissioner may on the occasion referred to in the 256th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), refuse to grant the bankrupt further protection on other grounds than for one of the offences specified in that section. The term “further protection” in the 257th section is not exclusively referable to cases in which further protection has been refused on account of the commission of any of the offences specified in the 256th section, and the certificate in the form contained in the schedule (B a) to the Act, and mentioned in the 257th section, may be granted where protection has been refused on other grounds than for one of the offences enumerated in the 256th section. The words “this enactment” in the 259th section are not referable to the whole Act, but to that particular section only. *Ex parte William Stanton*, 1 D. M. & G. 224.

2. *Review of adjudication.*—Where a bankrupt does not contest the validity of an adjudication of his bankruptcy before a commissioner within the period prescribed by the 104th section of the Act 12 & 13 Vict. c. 106, for showing cause against such adjudication, the commissioner has after that period no authority to entertain an application to review the adjudication either under the section or under the 233rd section. *Ex parte Carter*, 1 D. M. & G. 212.

3. *Refusal of certificate—Review.*—A proceeding to review the decision of a commissioner who has refused a certificate under the 39th section of the Act 5 & 6 Vict. c. 122, is not a proceeding for the continuance of which provision is made by the 4th section of the Act 12 & 13 Vict. c. 106; and such proceeding cannot be instituted except on one of the grounds specified in the 207th section of the

latter statute. The expression in the 4th section, that nothing in the Act is to lessen or affect any right, title, &c. of a person by virtue of proceedings under the existing bankruptcies, has reference only to the continuance and completion of proceedings affecting the administration of a bankrupt estate. In 1847, the commissioner refused the allowance of a bankrupt's certificate, under the 39th section of the Act 5 & 6 Vict. c. 122. In 1851, after the death of the commissioner, the bankrupt applied to his successor with the view of having the matter reheard, alleging that the statement of the opposing creditor on the occasion of the refusal was partial and imperfect: Held, that the application could only be made under the provisions of the 207th section of the Act 12 & 13 Vict. c. 106, and that inasmuch as the refusal of the certificate was not obtained by false evidence or improper suppression of evidence, or by fraud, the original decision could not be reviewed. *Ex parte Jonathan Higginson*, 1 D. M. & G. 204.

BANKRUPT LAW CONSOLIDATION ACT, 1849.—1. Annuling adjudication—Time for appeal.—Where a creditor petitions against an adjudication within the proper time, and the petition is not heard within the twenty-one days from the adjudication, and when heard it is dismissed, and the creditor appeals within twenty-one days after the commissioner's decision on his petition, his appeal is in time under the 12th section of that statute. A petition to the commissioner to annul the adjudication is not an appeal within the meaning of that section. *Ex parte Bean*, 21 Law J. (N. S.) Bank. 26.

2. *Certificate.*—E. M. and H. M. purchase a business of their brother's, but it was not paid for. E. M. attended to the accounts so far as they were attended to, and H. M. performed the duties of traveller to the business. E. M. and H. M. on various occasions raised money by deposits of goods, and paid 60l. per cent. for discount. H. M. ordered goods one day and pledged them on the next. The brothers, the vendors of the business, sued for the purchase-money, and issued execution on a judgment in the action. Both E. M. and H. M. were adjudicated bankrupts, and the commissioner refused them their certificates or protection, on the ground of not keeping proper books of account (as to E. M. destruction of books), obtaining goods for the purpose of pledging them, and fraudulent preference to the brothers who sold the business. H. M. appealed, and swore that he pledged the goods to meet a sudden demand for payment of bills falling due; that he believed he was solvent when the goods were bought, and that he had nothing to do with the keeping of the books; and he produced a witness who swore that the goods were ordered because they were wanted in the stock. The Lords Justices were of opinion that there was no wrong intention as to the books or the pawning, and that there was a pressure by the vendors, and, acquitting the appellant of fraud, granted him a second-class certificate, to be dated eight months. *Ex parte Martyn*, 21 Law J. (N. S.) Bank. 46.

3. *Same.*—A., a tallow-broker, in business with B., became bank-

rupt, and on application for his certificate had the same suspended for two years, and then to be of the third class. The case of suspension was supported by the commissioner on two grounds: first, that the bankrupt had fraudulently induced a creditor to forbear enforcing payment of a certain sum, by withholding information known to him and not known to the creditor, and which, if known, would have induced the creditor to enforce payment; the other case was for receiving money for goods alleged by the bankrupt to have been purchased, and then retransferring the goods to the person of whom he bought them, so that the creditor did not receive his goods, and lost his money. The Lords Justices were of opinion that the withholding of information, or the silence of the bankrupt regarding that information, was not dishonestly intended in the one case, and the act by which the goods were retransferred and the money lost in the second place was, upon the evidence before the Court, not fraudulent so far as the petitioner was concerned, and therefore they granted an immediate certificate of the first class. *Ex parte Gall*, 21 Law J. (N. S.) Bank. 43.

4. *Same—Fraudulent preference.*—A bankrupt had his certificate refused, was taken in execution, and lodged in gaol. The ground of the refusal of the commissioner was a fraudulent preference within the 256th section of the 12 & 13 Vict. c. 106; but the Court of Appeal, being of opinion that such a charge was not sustained, granted a certificate of the third class, and directed the release of the bankrupt from prison on a given day. *Ex parte Hunt*, 21 Law J. (N. S.) Bank. 29.

5. *Certificate meeting.*—The commissioner has authority under the 198th section of the Act to appoint a sitting for the consideration of the grant of a certificate to a bankrupt, although the bankrupt does not make the application himself. *Ex parte Sherlock*, 21 Law J. (N. S.) Bank. 36.

6. *“Conduct as trader.”*—A bankrupt, who had twice before compounded with his creditors, made false and fraudulent entries in his books, consisting of fictitious accounts in particular names. He stopped payment, being at the time able to pay 12s. in the pound, and soon after 11s. in the pound. The commissioners refused him his certificate and all protection excepting for the twenty-one days; and on appeal, the Lords Justices, acting under the discretion given by the 198th section of the Act, “a discretion to be exercised on judicial grounds with reference to the nature of the case in general and on its peculiar circumstances,” dismissed the petition of appeal with costs, affirming the decision of the commissioner and refusing any protection whatever, the conduct of the bankrupt being unfair, untradesmanlike, and disreputable. *Ex parte Curteis*, 21 Law J. (N. S.) Bank. 53.

7. *Same—Certificate.*—Bankers who, upon the evidence before the Court, must be taken to have been and to have known that they were deeply insolvent, continued to receive deposits and to issue notes for a period of eighteen months, during which time their assets would

not pay more than 5s. in the pound. On an adjudication of bankruptcy, the commissioner, for this among other reasons, refused them any certificate or protection. On appeal, the Court affirmed the refusal of certificate on the above-stated ground, but, upon the consent of the assignees and of the opposing creditors, granted protection to their persons. The certificate is a benefit to which a bankrupt may entitle himself by good conduct. Whether after a refusal of a certificate the granting of protection is of any avail against the common-law right of creditors who do not come in under the bankruptcy, *Quære. Ex parte Rufford*, 21 Law J. (N. S.) Bank. 32.

8. *Same—Fraud—Falsehood.*—A trader carried on business as a baker, and before the statute 12 & 13 Vict. c. 106, came into operation, obtained money from J., on pretence that it should be invested on mortgage, which was not done. He also obtained money from F., on a similar pretence, which was not invested. The trader became bankrupt, and the commissioner refused him any certificate; and on appeal, Held (dismissing the appeal), that the money of J. and the money of F. were obtained by fraud and falsehood; that on these grounds he was not entitled to his certificate; that before a bankrupt can ask for his certificate, he should have conformed to the bankrupt law since his bankruptcy; that if a trader so obtains money, though not in the course of his trade or in matters connected with his business, it is, on a question of certificate, conduct as a trader within the meaning of the Act; and that if a case comes otherwise within the Act, it is not the less so because the conduct complained of took place before the passing of the Act. *Ex parte Stamer*, 21 Law J. (N. S.) Bank. 56.

9. *Friendly society—Treasurer.*—Money, which by the rules of a friendly society ought to have been deposited with a treasurer appointed by the society, was paid directly to the bankers of the society. The bankers were adjudicated bankrupts, and the society, under the 167th section of the Bankrupt Act, claimed to be paid in full; and in support of the claim filed an affidavit, swearing that the bankers were employed in the office of treasurer: Held, that the petitioners were not entitled to payment in full. *Ex parte Oxford*, 21 Law J. (N. S.) Bank. 31.

10. *Inspection of documents.*—A creditor who had proved his debt, applied, by his attorney, under the 232nd section of the statute 12 & 13 Vict. c. 106, for leave to inspect the affidavit of debt, the proof of the act of bankruptcy, and other proofs filed in court on which the adjudication was founded, with a view to impeach the adjudication. The officer of the district court refused compliance. The creditor appealed, and it was held that this was not a reasonable request within the meaning of the statute; that the application was properly refused; and that the appeal must be dismissed with costs. *Quære*, whether the above-mentioned documents and proofs are within the language of the 232nd section. *Ex parte Rimell, in re Brewer*, 21 Law J. (N. S.) Bank. 27.

11. *Protection.*—An order obtained by a debtor under the 211th

and following sections (of arrangements under the control of the Court) of the statute 12 & 13 Vict. c. 106, granting protection until a certain day, exceeding two months from its date, is irregular. A debtor obtained such an order, and before the two months had expired, a creditor proceeded against the debtor under the 78th section, and procured a summons, returnable within the original two months, and the debt not being discharged within the time limited, the debtor was adjudged a bankrupt. The debtor petitioned for the discharge of the order of adjudication, which was dismissed with costs. The Court declined to give any judicial opinion whether, after an order granting protection under the 211th section, a creditor could proceed under the 78th section. *Ex parte Bowers*, 21 Law J. (N. S.) Bank. 13.

12. *Payments to chief registrar — Allowance to official assignee.* — The 54th section of the statute having enacted that certain amounts, not less nor greater than specified amounts per cent. on the gross produce, from time to time should be paid by official assignees to the chief registrar's account, the amount to be fixed by the senior commissioner, with the approval of the Lord Chancellor, and the chief commissioner having fixed the sums with such approval, the Court refused to interfere to alter the same; but the commissioner having made such allowances to the official assignee as, according to the amount of the bankrupt's estate, and the nature of the duties performed, were, in his opinion, just and reasonable, the Court differing from the opinion of the commissioner, and the official assignee not requesting the Court to fix the amount of allowance, the matter, on this point, sent back to the commissioner for reconsideration. *Ex parte Glyn*, 21 Law J. (N. S.) Bank 49.

13. *Railway stock — Government or other stock.* — The 201st section of the Act enacts that no bankrupt shall be entitled to his certificate if he shall, within one year before his bankruptcy, have lost 200*l.* by any contract for the sale or purchase of "any government or other stock:" Held, on appeal, affirming the decision of the commissioner, that railway stock is within the meaning of this section. *Ex parte Matheson*, 21 Law J. (N. S.) Bank. 18.

14. *Refusal of certificate.* — Whether the court of appeal has jurisdiction to refer back the question of certificate after the commissioner had refused it, *quære*. Whether the grant of the certificate by the commissioner, after he had once refused it would be valid, *quære*. *Ex parte Whitaker*, 21 Law J. (N. S.) Bank. 25.

15. *Removal of solicitor — Discretion of commissioner.* — Assignees appointed solicitors who were related by marriage to the bankrupts; the commissioner, deeming the appointment objectionable, gave the assignees time to decide whether they would discharge the solicitors, or whether they, the assignees, would themselves retire from their office at the time appointed. The assignees refused to do either, whereupon the commissioner removed the assignees: Held, upon appeal, that the removal of assignees is in the entire discretion of the commissioner, and the Court, refusing to interfere, dismissed

the appeal with costs. *Ex parte Bates, in re Williams*, 21 Law J. (N. S.) Bank. 20.

16. "*Trader debtor*"—*Summons—Particulars of demand*.—A creditor, a wholesale dealer, issued a summons under the 78th section of the Act, demanding payment of money due from a retail dealer in the same line of business, and described its items in the particulars of demand as goods: Held, this described with sufficient certainty the wares supplied, so as to prevent the annulling of the adjudication on the ground of uncertainty. The situation of parties, and nature of demand, are to be considered in determining what is convenient certainty. A doubt on the legal validity of an adjudication is not sufficient ground for annulling it. *Ex parte Bower*, 21 Law J. (N. S.) Bank. 61.

17. *Trading—Scrivener*.—A solicitor was adjudicated bankrupt as a scrivener, on evidence clearly establishing the fact; on appeal against the adjudication, he was examined, and the Court, being satisfied that upon the additional evidence he was not a scrivener within the meaning of the bankrupt law, annulled the adjudication, the Lord Chief Justice expressing his agreement in the decision only on the authority of cases determined by Lord Eldon and Lord Chief Justice Gibbs. *Ex parte Dufaur*, 21 Law J. (N. S.) Bank. 88.

FALSEHOOD. See BANKRUPT LAW CONSOLIDATION ACT, 8.

FRAUDULENT PREFERENCE. See BANKRUPT LAW CONSOLIDATION ACT, 4.

FRIENDLY SOCIETY. See BANKRUPT LAW CONSOLIDATION ACT, 9.

JOINT-STOCK COMPANIES' WINDING-UP ACT, 1849.—Proof—Separate creditors.—A. B. was a shareholder in a joint-stock banking company, which stopped payment. He became bankrupt, and afterwards, before he obtained his certificate, an order for the winding up the affairs of the banking company was obtained, and subsequently he obtained his certificate. The commissioner in bankruptcy declined to permit the official manager to prove for the amount of calls on the bankrupt's shares; but the Court held that under the 14th and 30th sections of the Winding-up Act, 1849, the official manager was entitled to go in and prove for the amount of calls in competition with his separate creditors. *Ex parte Nicholas, in re the Monmouthshire and Glamorganshire Banking Company*, 21 Law J. (N. S.) Bank. 64.

MARRIAGE SETTLEMENT.—*Trader—Right of proof.*—A trader, about to be married, and being in fact insolvent, of which insolvency the intended wife was ignorant, entered into a covenant with trustees to pay them a moderate sum of money, the interest to be paid to the wife's appointment, and in default to the intended wife, for life, for her separate use, then to the husband for life, and the capital to be in trust for the survivor absolutely. Property of the wife was also agreed to be settled upon the same trusts. The husband

became bankrupt, and the trustees applied to prove for the amount, which had never been paid, but the commissioner rejected the proof: Held, on appeal, that the settlement was good as against the assignees, and that the trustees were entitled to prove. *Ex parte McBirnie's Trustees, in re McBirnie*, 21 Law J. (N. S.) Bank. 15.

PETITION TO ANNUL. See ADJUDICATION OF BANKRUPTCY.

RAILWAY STOCK. See BANKRUPT LAW CONSOLIDATION Act, 13.

REFUSAL OF CERTIFICATE. See BANKRUPT, 8.

REVIEW OF ADJUDICATION. See BANKRUPT, 2.

SCRIVENER. See BANKRUPT LAW CONSOLIDATION Act, 17.

TIME FOR APPEAL. See BANKRUPT LAW CONSOLIDATION Act, 1.

TRADER DEBTOR. See BANKRUPT LAW CONSOLIDATION Act, 16.

EQUITY.

HOUSE OF LORDS.

3 House of Lords Cases, parts 2 and 3.

AGREEMENT NOT TO SUE.—*Promissory note—Practice.*—

A. made his promissory note payable on demand, with interest, in favour of B. and C., the executors of D. A. was, with several other relatives, to be entitled to certain benefits under D.'s will, upon the coming of age of the youngest legatee named in the will. By an agreement made between the legatees, the executors were authorized to lend the funds in their hands on personal security, and a part of these funds having been lent to A. (as well as to the other legatees), he gave the executors the note in question. By the agreement it was settled that the notes given to the executors should not be sued on till the youngest legatee had arrived to the age mentioned in the will. The executors did not sign this agreement, but when it had been signed by the other parties, took it into their possession. The executors brought the action while the legatee in question was alive, and before he had attained the specified age. A. pleaded the agreement as an answer to the action, averring that plaintiffs accepted and

received the note on the terms and conditions of the agreement, and that the youngest legatee was still under age. At the trial, the agreement was proved; Held, that the plea was bad in substance, for that the agreement was collateral, and was not between the same parties as the note. The judges were required to answer a question put by the House. One of them differed from the rest. The opinions of the majority were stated by one of their number, and in the statement the principle on which the dissentient judge formed his opinion, was set forth to his satisfaction. The House did not require him to state his reasons at length. *Salmon v. Webb and another*, 3 H. of L. 512.

APPEAL.—*Competency of pleading—Dilatory defence.*—A plea which does not merely raise an objection to a particular form of proceeding, leaving it to the plaintiff to proceed in a different form at another time, but which, if allowed, entirely bars the plaintiff from his remedy, is a peremptory, and not a dilatory plea, within the 6 Geo. 4, c. 120, s. 5, and a decree thereon may be subject of appeal to this House. A Scotchman was married in England to an Englishwoman, and then returned to Scotland, where he was domiciled. Some years afterwards the wife quitted Scotland and returned to England, where she lived separate from her husband. He came to England and instituted proceedings in the Arches Court for a restitution of conjugal rights. The wife, in her responsive allegations, charged him with adultery, and on that charge prayed for a divorce *a mensâ et thoro*. Judgment was given in her favour. The husband returned to Scotland, where the wife instituted a suit for a divorce *a vinculo*. The husband pleaded the proceedings in the Arches Court as a bar to further proceedings in Scotland: Held, that this plea raised a peremptory or substantial defence, and that a judgment thereon might be made the subject of appeal to this House. Where a petition to dismiss an appeal for incompetency has been directed by the Appeal Committee to be argued at the bar of the House, the counsel for the petitioner is entitled to begin. The petition was dismissed, but the costs were reserved. *Geils, appellant; Geils, respondent*, 3 H. of L. 280.

BANKER. See **PRINCIPAL AND SURETY**.

DIVORCE.—*Practice—Costs.*—Neglect, silence, shunning the wife's company, and declarations by the husband that he will never cohabit with her, do not constitute that "cruelty and maltreatment" in respect of which the law will grant to the wife a divorce *a mensâ et thoro*. Where, in a case of this sort, the Court of Session had pronounced for a divorce, the Lords reversed the interlocutor. Actual personal violence, or the immediate menace of it, is not the only ground of maltreatment in respect of which such a divorce will be granted. *Quere*, whether constant revilings and accusations of all sorts of crimes made, and falsely made, before friends and servants, would constitute a ground for such a divorce. The general principle of the law as to divorce *a mensâ et thoro*, is the same in England and

Scotland. (But it seems that a special principle exists in the law of Scotland, which permits a divorce for a wilful desertion continued for four years.) In a suit for a divorce *a mensâ et thoro*, the wife obtained judgment in the court below with costs. That judgment was reversed by the Lords, on the ground that the remedy sought was not the proper one; but the interlocutor was allowed to stand so far as it gave the wife the costs in the court below. The wife, however, was not allowed the costs of the appeal. (*Quære.*) *Paterson, appellant; Paterson, respondent*, 8 H. of L. 308.

EXECUTOR.—Residue—Trust.—A testator devised "all my estate, both real and personal, to E. E., his executors, administrators, and assigns, to and for the several uses, intents, and purposes following, that is to say;" and then, after specifying various objects of his bounty, appointed "the said E. E. executor of my last will and testament." The trusts of the will did not exhaust the estate: Held, affirming a decree of Lord Chancellor Cottenham, that E. E. did not become entitled, for his own benefit, to the personal estate undisposed of, but was a trustee thereof for the widow and next of kin of the testator, according to the Statute of Distributions. *Dawson v. Clark*, 18 Ves. 247, commented on, and Lord Eldon's opinions adopted. The rule in such a case is, that where there appears a "plain implication or strong presumption" that the testator by naming an executor, meant only to give the office of executor, and not the beneficial interest, the person named shall be considered a trustee for the next of kin of the undisposed surplus. *Ellicock, appellant; Mapp, respondent*, 3 H. of L. 492.

HEIRS. See **WILL**, 2.

LIBEL.—Innuendo—Malice—Evidence—Challenge of jurymen.—In an action for a libel in a Dublin newspaper, the first count, after the usual prefatory averments, proceeded thus: "What possessed Lord H. (meaning thereby the said Lord Lieutenant of Ireland), if he knew anything about the country, or was not under the spell of vile and treacherous influence, to make his first visit, and that carelessly puffed, to Long's, the coachmaker (meaning thereby the said plaintiff), the other day? If mere trade was his (meaning thereby the said Lord Lieutenant's) object, he had several respectable houses open to him (meaning thereby that the house and place of business of the said plaintiff was not respectable, and that the said visit was paid thereto for political objects):" Held, that the innuendo did not enlarge the sense of these words, which were fully capable of the meaning given to them. The third count repeated the same words, and accompanied them with the following innuendo: "(meaning thereby that the house of business of the said plaintiff was not a respectable house in the trade, and that the plaintiff himself was of such a character that he would not be visited, in the way of his trade and business, except from some political, or party, or other improper motive):" Held, that the words were capable of the

meaning thus attributed to them; but that if the innuendo was more extensive than the words, it might be rejected as repugnant and void, and that the words, being libellous, were actionable without its aid. In an action of libel the defendant pleaded the general issue, and also a plea under the 6 & 7 Vict. c. 96, denying actual malice, and stating an apology. On the trial, the plaintiff, in order to prove malice, tendered in evidence other publications of the defendant, going back above six years before the publication complained of: Held, that these publications were admissible in evidence. A town councillor is, by the 3 & 4 Vict. c. 108, disqualified from being a special jurymen. The name of a town councillor stood on a special jury-list after it had been reduced: Held, that under the Irish Jury Act, 3 & 4 Wm. 4, c. 91, he was liable to challenge for this disqualification when about to be sworn. The right of challenge against a jurymen is a common-law right, which cannot be taken away except by the express terms of a statute; and *quære* whether it is taken away by the 3 & 4 Wm. 4, c. 91, except in cases where corporate bodies are parties, and kindred or affinity with a member of the corporate body is the ground of challenge. It is not taken away by the effect of the 3 & 4 Wm. 4, c. 91, in respect of a disqualification created since that statute. Where a challenge in respect of such qualification was made after reducing a special jury, it was held not to be necessary to allege that the disqualification had arisen since the jury was reduced. *Barrett v. Long*, 3 H of L. 395.

LONDON TITHES. — *Railway—Corporation.* — By the statute 37 Hen. 8, c. 12, the inhabitants of certain parishes in the city of London, therein mentioned, are to pay tithes at the rate of 2s. 9d. in the pound on their rent. By the 2 & 3 Vict. c. xcv. (the Black-wall Railway Act), where houses in any of these parishes, of which St. Olave's, Hart-street, is one, shall be taken for the purposes of the railway, after the occupiers shall have quitted their houses, and "until new houses or other buildings shall be erected and occupied, of such annual rent or value that the tithes of such new houses shall be equal to the tithes payable for the houses quitted, the tithes or payments in lieu of tithes payable in respect of the houses quitted, according to the last assessments thereof, to the 25th March, 1839, or annual sums of money, equal to the loss in tithes, which the rectors may sustain by the taking down of such houses, shall be paid and payable to the said rectors," &c. The company removed a great many houses and built two others, which were at once occupied: Held, reversing a decree of Vice-Chancellor Wigram, that the object of the Act was only indemnity to the clergy; that, therefore, the clergy were entitled to receive only what they would have received if the railway company had never interfered with the premises; that the company was liable to pay, in respect of houses removed, where no others had been built in their places, such sums as were actually paid to the rector, whether by agreement or otherwise, up to the 25th of March, 1839; that the amount before then agreed upon between the rector and the occupant, and paid by the occupant, constituted the "assess-

ment," within the meaning of the Act, and that the amount of compensation must be measured thereby; and, further, that where new houses had been built and occupied, the company was entitled to be credited (in reduction of its general liability to make compensation under the Act) with the sums which had become payable in respect of such new houses, and not merely with those which had been actually received therefrom. A decree, directing a reference to the Master, to make certain calculations on bases laid down in that decree, was made in 1847. The decree was not then appealed against; the inquiry took place in the Master's office, and he made his report, which the defendants in the suit excepted to: these exceptions were overruled, and the report confirmed, but no costs were given on either side. After these proceedings had taken place, the defendants appealed to this House against the decree itself. The decree was reversed, and the cause remitted with directions; but no order was made as to the costs incurred in the court below, between the date of the decree and of the appeal, the court below being left to deal with them as it might think fit. *Blackwall Railway Co. v. Rev. John Letts*, 3 H. of L. 470.

MALICE. See LIBEL.

MORTGAGE. — *Covenant — Specialty creditors — Costs.* — A mortgagor represented to an intending purchaser that the estate was only liable to a mortgage for 20,000*l.* to C. and Co., an additional sum of 10,000*l.* being secured on the mortgagor's personal property. The whole sum had, in fact, been originally secured on the land; and C. and Co. denied that they had ever done anything to part from their security on the land. After the death of the mortgagor, C. and Co. filed a bill of foreclosure, and obtained from the purchaser the whole 30,000*l.*: Held, that, as between the purchaser and the executors of the mortgagor, the representations made by the mortgagor to the intending purchaser were equivalent to a contract with him; and the personal property of the mortgagor was liable to the extent of the 10,000*l.* C. and Co. were legal mortgagees and specialty creditors for a sum of 30,000*l.* on Y.'s estate; certain official persons, acting as trustees for the Crown, paid off this debt, and received an assignment of the mortgage and of a covenant therein contained, with liberty to sue upon it in trust for the Crown: Held, that the Crown was legal mortgagee and specialty creditor for the 30,000*l.* originally due to C. and Co. It is not a rule of equity, that upon the purchase of property subject to incumbrance for its full value, the vendor is bound to apply the purchase-money in payment of the incumbrances, according to their priorities. Such a duty can only be the result of express agreement or of a contract, to be implied from the circumstances of the case. Where a lease containing a personal covenant for the payment of rent is surrendered, the personal covenant is independent of the estate in the property, and as to rent previously due is not affected by the surrender, but the lessor remains a specialty creditor for the rent which accrued due before the surrender. This House, in overruling exceptions which

had been allowed in the court below, but which ought to have been overruled there, gave the costs in the court below. *The Attorney-General, appellant; Cox and others, respondents*, 3 H. of L. 240.

PETITION OF RIGHT.—*Statute.*—A., a British subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French revolution. The governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English government received all the money agreed upon between the two governments as the amount of compensation, and undertook to satisfy all the claimants. An Act of Parliament was passed, declaring how claims were to be preferred and liquidated. A. presented his claim to commissioners appointed under the Act, and adopted the modes of proceeding provided by it: his claim was rejected. After payment of the claims which were established to the satisfaction of the commissioners, a surplus remained, which, in accordance with one of the provisions of the Act, was paid over to the Lords of the Treasury. A. proceeded to make his claim afresh under a petition of right: Held, that he had no remedy, except under the provisions of the statute. *Baron de Bode v. Reg.* 3 H. of L. 449.

POOR-RATE.—*Vestry—Adjournment—Pleading.*—A rate for the relief of the poor, which is lawfully made in other respects, is not rendered invalid by the circumstance that some of the vestrymen who concurred in making it were vestrymen *de facto*, and not *de jure*. Where a notice of the purpose of a vestry meeting has been duly given, and that meeting has begun, but not completed, a certain business, and the meeting is regularly adjourned, such business may lawfully be completed at the adjourned meeting, though the notice for summoning such adjourned meeting does not state the purpose for which it is summoned. A vestry, duly assembled by notice for that purpose, on the 12th of August, resolved, "That a rate of one shilling in the pound be made, and the same is hereby made and laid, and is to be collected forthwith." This resolution was signed by the requisite number of vestrymen; but one of the persons so acting was not at that time a vestryman *de jure*. The parish was so large that the estimate of the assessments required by the 6 & 7 Wm. 4, c. 96 (Parochial Assessments Act), could not be prepared and signed at the vestry. It was resolved, "that the vestrymen be summoned for the 4th of September, to elect a director of the poor in the place of," &c., and the vestry then adjourned to the 4th of September. A special meeting of the vestry was held on the 28th of August, when the minutes of the last meeting were read and confirmed, and other business was transacted. On the 4th of September there was a general meeting of the vestrymen, pursuant to adjournment from the 12th of August, when the minutes of the last vestry were read and confirmed, and the vestry was occupied with hearing applications from poor parishioners for relief from payment of the poor-rate. This meeting adjourned to the 9th of September. On the 9th of

September another general meeting of the vestry was held, when the minutes of the last vestry were read and confirmed; the vestry was occupied as before, and adjourned to the 14th. On the 14th of September the vestrymen again met, having received a summons, which, however, did not state the purpose of the intended meeting, and four volumes, arranged in continuous alphabetical order, like one book, were produced, containing the particulars of the assessment required by the 6 & 7 Wm. 4, c. 96, and the last of these books was duly signed, and the rate thus completed, was allowed by the justices: Held, that the rate thus made was a valid rate. In replevin for seizing the plaintiff's goods under a distress for this rate, an avowry alleged that a poor-rate had been made after the passing of a certain specified local Act, and before the taking of the said goods, and whilst the property of the plaintiff was, and the plaintiff in respect thereof was, liable to be rated, to wit, on the 12th of August, 1839: Held, that this was a good avowry, and was proved by the facts above stated. *Scadding v. Lorant*, 3 H. of L. 418.

PRINCIPAL AND SURETY.—*Banker—Alteration of Agreement.*—A variance in the agreement to which a surety has subscribed, which variance has been made without the surety's knowledge or consent, and which may prejudice him, or amount to the substitution of a new agreement for a former one, will discharge the surety, though the original agreement, notwithstanding such variance, may be that on which the liability is substantially incurred. A. became surety for B.'s conduct as a clerk in a bank; B. was subsequently appointed to a better situation in a branch of the same bank, and A. extended his suretyship to this new situation. B. afterwards, while remaining in the situation, undertook, on having his salary raised, to become liable to one-fourth of the losses on discounts. No communication of this arrangement was made to A. B. allowed a customer considerably to overdraw his accounts, and thereby the bank lost a sum of money: Held, the surety could not be called on to make good this loss, though it fell within the terms of the original agreement, as the fresh arrangement was the substitution of a new agreement for the former one, and A. was thereby discharged. *Bower, appellant; MacDonald and others, respondents*, 3 H. of L. 226.

PROMISSORY NOTE. See AGREEMENT.

RAILWAY AGREEMENT.—*Notice.*—A., a landowner through whose estate a part of a projected railway was to pass, became a party to a deed with the projectors of the railway, by which he covenanted to withdraw his opposition to their bill, and to oppose a rival bill; and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed, or to pay him a different sum if the rival bill should pass within eighteen months from the date of the deed. It was then provided, that if the bill of these projectors should not be passed within six months from the date of the agreement, either party might put an end to the agreement by a notice. The deed then contained a cove-

nant on the part of these projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated the 16th of March, 1846. The two companies were amalgamated in June, 1846, but no bill ever passed at the instance of these projectors alone. In November, 1846, these projectors gave a notice to put an end to the agreement. A. declared in covenant against these projectors on that clause of the deed by which he was to receive a sum of money within three months after the amalgamation of the companies. The defendants pleaded that their bill had never passed into a law; that at the end of six months they had given notice to put an end to the agreement; and that they had not taken the plaintiff's land: Held, that this plea was no answer to the action. *Caffer and others, plaintiffs in error; Earl of Lindsey, defendant in error*, 3 H. of L. 293.

RAILWAY COMPANY.—*Winding-up Acts—Contributory—Equitable liability—Practice.*—A projected railway company provisionally registered is within the meaning of the Winding-up Acts, which may therefore be applied to it if a Court of Equity shall so think fit. The liability of a person as a contributory under the Winding-up Acts, is not a question of law, but of fact. The test of his liability in equity is his liability at law. Contributories are those only who have contracted by themselves or agents with a creditor, or who have agreed to indemnify or repay, in part or in all, those who have contracted with the creditor on their own account. A. was a member of the provisional committee of a projected railway company which had been provisionally registered, and the affairs of which were put under the authority of a managing committee. He accepted shares and paid a deposit on them, but did no further act. The scheme was abandoned: Held, that on these facts he was not liable to a creditor for business done under the orders of the managing committee, towards completing the projected undertaking, and converting the association into a regular company, and consequently he was not liable as a contributory under the Winding-up Acts. This House is at liberty, without regard to the form of an appeal, or the points raised upon it, to put questions of law to the judges. *Quære* whether this House, like any other court of justice, may in a subsequent case overrule a previous decision of its own. *Bright, appellant; Hutton, respondent*, 3 H. of L. 341.

RAILWAY. See LONDON TITHES.

SPECIALTY CREDITOR. See MORTGAGE.

TRUST. See EXECUTOR.

VESTRY. See POOR-RATE.

WILL.—1. *Construction—Trustees not acting—Rule of court.*—Where trustees are directed to pay a certain sum to a person for life, and are empowered, according to their discretion, to invest the trust-funds, out of which that sum is to arise, but decline or neglect to act, and the assistance of a Court of Equity is sought in order to carry

into effect the purposes of the will, the Court will not, as a matter of course, exercise the discretion, but will only act on its established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding. A testator, after making certain specific bequests, proceeded as follows: "I give and bequeath to my trustees hereinafter named, so much of my personal estate and effects as at the time of my decease shall produce the clear annual income of 1,500*l.*, and I direct that the same shall be selected and appropriated and set apart as soon as may be, &c., by my said trustees in their uncontrolled discretion, upon trust to pay" to his wife the dividends during her life or widowhood, and after her death or second marriage, the same was to become part of his residuary personal estate. He directed, that if the annual produce so appropriated should be increased or reduced in amount, his wife was to receive the increased or reduced dividends, as the case might be, in lieu of those before directed to be paid to her. The trustees were fully empowered at their discretion to permit the personal estate to continue on the same securities as at the time of his decease, or to sell and re-invest as the testator himself might do. Some of the foreign funds ceased to pay any dividends, and the trustees refused to exercise their discretion as to altering the investments, but submitted to act as the Court should direct. The Court refused to exercise the discretion vested in the trustees, but, acting on its general rule in such matters (as the testator had not expressed a different intention), directed the annuity to be raised by the purchase of an adequate sum in Consols, and ordered the Master to inquire, having regard to the interests of other parties under the will, which investments must be called in to effect this object: Held, that the decree thus made was correct. The costs of the appeal were ordered to come out of the estate, but the trustees having unnecessarily printed certain documents for the hearing of the appeal, the costs of such printing were disallowed. *Prendergast and others, appellants; Prendergast and others, respondents*, 3 H. of L. 195.

2. *Right heirs.—Limitation of real and personal estate—Power to convert personal.*—A testator made a will in the following form: "Whereas I am seised in fee simple of divers freehold manors, or reputed manors, messuages, lands, tenements, rents, and hereditaments, situate, &c.; and of a leasehold estate in, &c., and also of a copyhold estate situate, &c., and also of freehold estates in, &c., and of large sums in the funds of England: Now I do hereby give and devise, after my just debts and funeral expenses and legacies are paid (which I order to be paid out of my personal estate), all my estates in the funds of England, and all my said manors, &c., unto three persons in succession, and their sons successively in tail male, in strict settlement; and for default of such issue, I give and devise the same to my own right heirs for ever." He then gave his trustees a power, with the consent of the person who might be in possession, to lay out his personal estate in the purchase of freeholds, &c., and to settle the same when purchased, to such uses as were declared of his "manors,

or reputed manors, messuages, lands, rents, hereditaments, tenements, and premises devised by this my will, as shall be then existing undetermined, or capable of taking effect, &c., to &c., for no other estate, use, trust, or purpose whatsoever:" Held, first, that the power to trustees to convert personalty into realty did not operate as an absolute conversion; but, secondly, that, on the face of the will, it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both properties go together, and to give both to persons expressly designated; and that such intention did not cease with the failure of issue male under the limitations, so as to make the real estate afterwards go in one way, and the personal estate in another. *De Beauvoir, appellant; De Beauvoir, respondent*, 3 H. of L. 524.

CHANCERY.

Comprising the Equity Cases contained in the following Reports:—

1 De Gex, McNaughton, and Gordon, part 1.	21 Law Journal (N. S.), parts 10 and 11.
9 Hare, part 4.	

ADVOWSON.—*Charge*—*Contempt*—*Receiver*.—A judgment having been entered up against a beneficed clergyman for a debt, the Court held that it was a charge upon the benefice, and that the creditor was entitled to have a receiver of the profits of the benefice appointed. Another creditor of the clergyman obtained judgment upon his debt, and issued a writ of sequestration directed to the receiver already appointed: Held, upon motion to commit the second creditor for contempt, that upon his undertaking to deal with the tithes as the Court should direct, and pay the costs of the motion, no order should be made. *Hawkins v. Gathercole*, 21 Law J. (N. S.) Chan. 617.

ALLOWANCE TO PARENTS. See **INFANTS**.

ANNUITY.—*Charge on the corpus*—*Compulsory sale*.—A testator devised a real estate to B., charged with an annuity to A. for her life, with powers of distress and entry. The rents fell short of the annuity, and an arrear became due to A. A sum of money (less than the arrear) was paid into the court by a railway company in respect of a part of the estate which had been taken by them: Held, that A. was entitled to this sum in respect of her arrears. *In re Tinkler's Trusts*, 21 Law J. (N. S.) Chan. 672.

APPOINTMENT TO CHILDREN. See **MARRIAGE SETTLEMENT**.

CHARITY, DISTRIBUTION OF.—1. After a distribution of charity funds for more than two centuries among the poor of certain

parishes, an adverse claim on behalf of other parishes to participate in the benefit of the charity is not properly brought forward by petition under Sir Samuel Romilly's Act, but is properly the subject of an information. *In re Magdalen Land Charity*, 9 Hare, 624.

2. *Scheme—Protection of the interests of a large body of persons.*—A railway company took for the purposes of their Act a piece of land belonging to the corporation of L., but over which the freemen of L. had certain rights. By one of the Railway Acts of the company it was enacted, that out of the purchase-money the costs of the corporation should be paid, and that such a sum should be appropriated for the corporation as the Court of Chancery should, on application of the corporation, direct, and that the residue should be applied for the permanent benefit of the freemen, as the Court of Chancery should on the same application direct, and that notice of such application should be fixed on the door of the town-hall, on an application by petition by the corporation of L. for a scheme: Held, that the freemen of L. ought to be represented at the hearing. *Ex parte The Mayor, Aldermen, and Citizens of Lincoln*, 21 Law J. (N.S.) Chan. 621.

CHURCH OF SCOTLAND.—*Chapel — Foundation between Restoration and Revolution.*—A chapel in England was founded between the Restoration and the Revolution, without any deed or document declaring the purposes for which it was to be used; but it appeared that from the foundation the services had always been conducted in conformity with the Directory, by which the mode of worship in the Church of Scotland is regulated: Held, that the chapel must be treated as appropriated to the purposes of religious worship according to that Directory, and therefore according to the Presbyterian form. A minister of such a chapel had been ordained by a Scotch Presbytery. He afterwards became a member of a synod assembled in England, which adhered to certain resolutions respecting church patronage in Scotland. Subsequently, a general assembly of the Church of Scotland enacted, that all members of that synod who so adhered were no longer members of, or in communion with, the Church of Scotland: Held, that the minister was thereby deprived of his status of an ordained minister of the Scotch or of any Presbyterian Church, and became disqualified from acting as the minister of the chapel (independently of any question whether it was necessary for him to be a Scotch minister or licentiate), it being an essential part of the Presbyterian system, that none but ordained ministers or licentiates should perform Divine service: *Semble*, per Lord Justice Knight Bruce, that with respect to a question of property, it is competent for a congregation of Dissenters, acting unanimously and with the concurrence (where they have trustees) of their trustees, to introduce effectually into their system and constitute new regulations, not in contravention of any deed of trust and not opposed in principle to the original constitution; and that it is competent for such a congregation in England to resolve effectually, though not irrevocably, that every future minister shall be a person

in communion with the Established Church of Scotland. The effect of usage, as evidence of the trusts on which a Dissenters' place of worship is held, varies greatly in different circumstances, and the Court differing in opinion upon the evidence, whether it was a necessary qualification for a minister of a particular chapel to be a minister or licentiate of the Church of Scotland, the decree of the Court below declaring that qualification to be necessary was affirmed, as well as other portions of the decree, with which both members of the court agreed. *Attorney-General v. Murdoch*, 1 D. M. & G. 86.

COMPANY.—1. *Eastern Archipelago Company—Shares—Calls—Repayment.*—Bill by one of the shareholders of the Eastern Archipelago Company, which was incorporated by charter, alleging that the public purposes of the grantors of the lands and mines, which the company held, and in furtherance of which the plaintiff had subscribed for shares, had not been fulfilled, and that such grants had been diverted in a great degree to private objects, and that the charter had been granted by the Crown, on condition that a moiety of the capital should be subscribed for, and a fourth thereof paid up within a limited time, which condition also had not been fulfilled; and that having failed to fulfil such intentions and conditions, it was a fraud on the part of the directors to certify that they had been performed, and to commence the business of the company and make calls as they had done; and praying repayment of such calls, and injunction to restrain the directors from making calls and carrying on business for the future, and an indemnity to the plaintiff. The company and directors demurred to the bill, and the demurrer was allowed. A party becoming a member of a public company or corporation upon false representations, made not to him alone, but to him and other members, cannot be entitled on that ground to any decree for the repayment of his subscriptions to which the other members would not be equally entitled; and if he be entitled to such repayment, he cannot obtain that relief in the absence of the other members. It is no ground for relief in equity at the suit of a shareholder against the company, that the charter from the Crown, or the grant of the company from a private person, has been obtained by misrepresentation to the Crown or to such grantor. It is for the Crown or the grantor, if either should complain of the fraud and misrepresentation, to take proceedings to set aside the charter or the grant. The provision that the business of the company should commence from the date of the certificate of the directors that a stipulated number of shares had been subscribed for and the stipulated capital paid up, Held, not to mean that the company was not to exist antecedently to that date, where the deed provided that the parties were to be associated, the business to be carried on, and the directors to have power to act for the company, notwithstanding the full number of shares were not subscribed for. The averment in the bill and the defendants alleged that the other shareholders had concurred (or the admission of the defendants, the directors, that the other shareholders had concurred) in the prose-

cution of the business of the company, notwithstanding the terms of the charter were not satisfied, does not afford ground for a decree which might prejudice the interests of the other shareholders; for the allegations (or admissions) of the defendants cannot be taken as a proof of the conduct or affect the rights of such shareholders. Where it appeared upon the bill that the deed of settlement of the company was enrolled in court, and that the plaintiff had seen the deed (the bill stating the number of shares which were subscribed for thereupon), the allegation in the same bill, that the plaintiff was ignorant and unable to discover who the shareholders were, was not upon demurrer taken to be a fact; and in such case the Court, weighing one allegation against the other, held that the absence of the other shareholders was not sufficiently accounted for. *Macbride v. Lindsay*, 9 Hare, 574.

2. *Winding up*.—A committee was appointed under the provisions of the deed of settlement for winding up the affairs of a joint-stock company. The existing law being inadequate for the purposes, the committee incurred large expenses in procuring the insertion into a bill then before Parliament of certain clauses applicable to the affairs of the company: Held, affirming the decision below, that these expenses were not a charge against the company, not being authorized by the deed of settlement or by the individual shareholders. *In re St. George Steam Packet Company*, 21 Law J. (N. S.) Chan. 593.

CONTRACT FOR SALE.—Reversion—Purchaser misled.—The Court may not decree specific performance of a contract for the sale of a reversion, if the vendor had misled the purchaser, by stating that it was subject to a lease, containing all the usual covenants for repairs, &c., the vendor knowing at the same time that there was no person against whom the covenant could be enforced; but where property is sold subject to a lease-so described, and tenants are in possession of the property, and pay their rents according to the terms of the lease, and the vendor is not aware at the time of the contract of any difficulty in enforcing the covenants, the Court will not refuse to decree specific performance, on the ground that the vendor cannot show upon whom the liability of the covenants in the lease has devolved, and the vendor is not bound to find out and acquaint the purchaser with the name of the party who may be liable to such covenants. Though a puffer ought not to be employed to screw up the price or take advantage of the ignorance of other bidders, yet a progressive bidding, to a fixed or reserved bidding, by a person employed by the vendor, without the knowledge of the other bidders, will not necessarily be deemed to be taking an advantage of their ignorance. A party to a contract becoming aware of an objection to the validity of the contract, must forthwith state it as an objection on which he means to resist performance of the contract, or if, after such knowledge, he treats the contract as subsisting, he will be considered to have waived the objection. Though the auctioneer, at a sale by auction, is the agent of the purchaser,

yet he is not his agent for all purposes, and there is no reason why he may not sell property of which he himself is owner. *Semb. Flint v. Woodin*, 9 Hare, 618.

CONTRACT FOR PURCHASE. See LAND.

CONTRIBUTORY. See JOINT-STOCK COMPANY.

COPYHOLD ENFRANCHISEMENT ACT.—*Costs of petition for investment*.—A bishop, lord of a manor, enfranchised certain copyhold lands, held of the manor, under the Copyhold Enfranchisement Act, and the consideration-money was paid into court. A petition was presented by the bishop for the investment of the money: Held, that the Copyhold Commissioners had a right to appear at the hearing of the petition, and that their costs of the petition, and those of the bishop, were payable out of the consideration-money. *Ex parte Bishop of Hereford*, 21 Law J. (N. S.) Chan. 608.

COSTS.—*Unopposed petition*.—An unopposed petition contained statements which were immaterial to the prayer. The Court inserted in the order a direction to the taxing Master in taxing the costs to have regard to such statements. *Hyder v. Coleman*, 21 Law J. (N. S.) Chan. 592.

DISSOLUTION. See PARTNERSHIP.

EASTERN ARCHIPELAGO COMPANY. See COMPANY, 1.

INJUNCTION.—*Proceedings at law*.—The plaintiff had obtained the common injunction to stay execution in an action on the same day that the action was tried, but before the verdict was given against him: Held, upon motion by the defendant, before answer, that the plaintiff must pay the amount for which judgment had been signed into court, within a specified time, or the injunction must be dissolved. *Anderson v. Noble*, 21 Law J. (N. S.) Chan. 586.

INFANT.—*Allowance to parents out of infant's income*.—The Court will not give a direct benefit out of an infant's income to his father. A scheme, by which an infant (whose father was living) was to be articted to a solicitor, and to live with an uncle residing in the same place, was approved of by the Court, and the uncle was appointed to act in the nature of a guardian to the infant, and to have an allowance out of his income. An application that an allowance might be made to the father, who lived at a distance, and was in very narrow circumstances, was refused. *In re Stables*, 21 Law J. (N. S.) Chan. 620.

JOINT-STOCK COMPANY.—1. *Contributory*.—A contributory to a joint-stock company under the 37th section of the Joint-Stock Companies Winding-up Act, 1848, to have notice of all proceedings before the Master in the matter of the company. The official manager being about to submit to the Master proposals for the sale of the works of the company, and for a reserved bidding, it was stated that the solicitor who had attended for the contributory, was

the solicitor of persons desiring to purchase the works, and might, if he were allowed to attend, make use of the information which he would thereby acquire, to the prejudice of the estate: Held, that the Master was not justified in ordering that the official manager should attend him in private on the matter of the reserved bidding. *Ex parte Slatter's Executors*, 1 D. M. & G. 64.

2. *Winding up—Costs of solicitor.*—Previously to the passing of the Winding-up Act, 1849, a joint-stock company was dissolved under provisions contained for that purpose in the deed of settlement of the company, and a committee was appointed for winding up its affairs. Finding it impossible to do this in the then existing state of the law, the committee incurred a considerable bill of costs in attempting, through their solicitor, to get the public Acts of Parliament, which, at that time, were being brought forward, made applicable to the case of the company, and finally, in urging forward the passing of the Winding-up Act itself. On the passing of that Act, an order was obtained for winding up the company; the committee then claimed to be paid out of the assets of the company the amount of their solicitor's bill of costs, but this claim was disallowed, on the ground that the matters in respect of which the costs were incurred were beyond the power of the committee. *In re St. George Steam Packet Company*, 1 D. M. & G. 147.

LAND. — *Contract for purchase — Interest for purchase-money.*—Pending a dispute respecting the title to land contracted to be sold, and to avoid the question as to the interest of the purchase-money; the vendor gave the purchaser the opportunity of investing the purchase-money in consols, in the joint names of the vendor and purchaser, provided the investment was made by a certain day; and the purchaser made the investment accordingly: Held, that the vendor, having proposed the investment, could not have charged the purchaser with the loss if the funds had fallen, and the vendor was entitled to the benefit accruing from the funds having risen. A purchaser cannot throw upon a vendor the risk of an investment of the purchase-money, and if he makes a payment to or on account of the vendor, in respect of the purchase-money, the money becomes the property of the vendor, so that the purchaser can claim no benefit of any investment the vendor may make. *Burroughes v. Brown*, 9 Hare, 609.

LAND-TAX.—*Redemption—Wells cathedral—Prebendary.*—The Legislature intended by the Acts for the redemption of the land-tax to authorize all such sales for that purpose to be made by ecclesiastical persons, with the consent thereby required, as could have been made for any purpose with the like consent before the passing of the restraining statutes, and before the restraining statutes a sale might have been made from a prebendary in his corporate character to a prebendary in his individual character. An objection to the validity of a sale under the Land-Tax Redemption Acts, upon the grounds that the lands were not properly saleable, and, apart from any ques-

tion of fraud, were not properly sold under the Acts, is a legal objection, and there being no impediment to the trial of that question at law, a bill in equity on such a ground cannot be supported. But the confirming statutes, 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, have removed any objection to a sale and conveyance under the Land-Tax Redemption Acts arising from the property so sold not having been originally saleable or not having been properly sold within the meaning and according to the directions of the Acts. If it were shown that a purchase under the Land-Tax Redemption Acts had been effected by fraud, the Court would rectify it, notwithstanding the confirming statutes; for a purchase so effected would not acquire validity from those statutes. The restriction expressed or implied in the words of section 25 of the confirming statute 57 Geo. 3, c. 100, "the titles derived under such sales," construed to mean that the Acts were not to operate upon titles anterior to the sales under those Acts, and not to limit the confirmation to the titles of such purchasers only. Under the statutes for the redemption of the land-tax, the lords commissioners are placed in the position of vendors; and, therefore, if the trustees of a charity should purchase the property of the charity under those Acts, they would not be purchasing for themselves, but for the lords commissioners. The confirming statutes, 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, remove any objection which might have been raised on the ground of the party selling under the Acts being both vendor and purchaser. *Beaden v. King*, 9 Hare, 499.

LUNACY. See PARTNERSHIP.

MAINTENANCE. See WILL, 1.

MARRIAGE SETTLEMENT.—*Appointment to children*—By a marriage settlement, freehold estate and some personal estate were conveyed and assigned to trustees upon trust, on the request of the husband and wife, during their joint lives, and after the death of either, upon the request of the survivor, to sell the estate, and to stand seised and possessed of the estate until sold, and of the purchase-money in case the same should be sold, upon trust for the husband for his life, and after his decease upon trust for the wife for her life; and after the death of the survivor of them, to convey the estate, unless sold, and assign the personal estate unto the children and grandchildren of the marriage, born in the lifetime of the husband and wife, as they or the survivor should appoint; and in default of appointment, unto and amongst the children of the marriage equally. The estate was taken by the corporation of London, under the London Bridge Act (4 Geo. 4, c. 50), and the price having been fixed by a jury, the purchase-money was paid into the court under the Act. The trustees of the settlement not making out a satisfactory title, Held, that in the absence of any conveyance by the trustees, the sale must be deemed to have been effected under the Act of Parliament only, and therefore that the purchase-money was impressed with the character of real estate, under the 35th section of the London Bridge Act. That if there had been any conversion, it must have been by

the conjoint operation of the articles of settlement and of the Act of Parliament; but that the settlement and Act of Parliament could not in this case have any conjoint operation. That the estate having been real when settled, it was not meant by the settlement that it should become personal, unless the husband and wife, or the survivor, requested it to be sold. That the words of request should not be construed as merely intended to enforce on the trustees the obligation of sale, but as inserted for the purpose either of enforcing obligation or giving discretion, as the context of the instrument might require. That the payment of money into court, owing to an objection to the title, and the application of the trustees and tenants for life for the dividends, did not tend to connect the sale with the trust, but led to a contrary conclusion, inasmuch as the City of London having the power to require a perfect title under their Act, would not be likely to prefer an imperfect one under the trust. That there could be no sale pursuant to the trust without a conveyance of the estate by the trustees, and the payment of the purchase-money to them; and if, after the fixing of the price by a jury, there had been a conveyance by the trustees at the request of the tenant for life, the Court would have held the sale to have been under the trust—*Semble*. *In re Taylor's Settlement*, 9 Hare, 596.

MERGER OF TITHES, &c. See **TITHE COMMUTATION ACT**.

MORTGAGE.—*Prior claims*—*Notice of security*—*Lien for costs*.—A purchaser of property subject to a mortgage made, before the completion of his purchase, a second mortgage of it; he afterwards created a third mortgage, with respect to which the second mortgagee's conduct was such as to give it priority over his. Then the purchase was completed, the purchaser paying off the first mortgage, and taking a conveyance to a trustee for himself. On this occasion the title-deeds were handed to his solicitor, who afterwards took a transfer of the third mortgage. One of them was the trustee for the purchaser in the conveyance. The second mortgagee did not give them, nor had they any notice of his security: Held, that nevertheless their lien, either for their general bill of costs, or for their costs relating to the conveyance, could not prevail against the second mortgagee, the rights of a solicitor in respect of his lien for his bill of costs being no greater than those of the client, and the circumstances of the case not exempting it from the scope of this rule. *Quere* whether the lien of a solicitor is affected by his taking a partner. *Pelly v. Wathen*, 1 D. M. & G. 16.

PARTNERSHIP.—1. *Dissolution*—*Lunacy*.—Decree made for the dissolution of a partnership, in consequence of the lunacy of one of the partners. *In re James Coles, a lunatic*, 1 D. M. & G. 171.

2. *Solicitors*—*Articles*—*Appointments*—*Dissolution*.—A. and B. and the son of B. entered into partnership as solicitors, and by articles agreed, (2) that the partners were diligently and faithfully to employ themselves in carrying on and managing all the professional business in which they or either of them might be employed or concerned; (5)

that B. should use his best endeavours to obtain the appointment of the partnership firm to three offices or clerkships, which were then held by B., and such offices should be partnership appointments; (6) that all other compatible offices should be obtained, if possible, in the name of the firm, and the emoluments treated as part of the profits of the partnership; (15) that if B. or his son should retire, or A. or B. or his son should die, the share of the deceased partner should accrue to the surviving partners; that if B. or his son retired, they were to use their best endeavours to secure the practice to the continuing partners, and such retiring partners should not practise within thirty miles; (16) that if either partner should not diligently and faithfully employ himself in carrying on the said partnership practice, and should, on receiving moneys, bills, notes, &c., knowingly or willingly omit immediately to make entries thereof, or if A. or the son of B. should absent himself more than two months in one year, the others or other of the partners, if they or he should think fit, should be at liberty to dissolve the partnership, by giving to the offending partner a notice to that effect; and the partnership should from that time, or the time specified in the notice, be dissolved in the same manner and with the same consequences as if it had determined by the voluntary retirement of the offending partner. B. and his son subsequently procured their own appointment, or the appointment of one of them, to the offices or clerkships, and did not endeavour to procure the appointment of A. It was afterwards discovered that B. was greatly involved in debt, and he absconded in January, 1849, and did not return to business. In May, 1849, A. served a notice, in the manner pointed out by the articles, on B. and his son, to dissolve the partnership from that date, and he then filed his bill against B. and his son, to have the dissolution declared by the Court, an injunction to restrain them from practising within thirty miles, and a decree that they should resign the several offices or clerkships: Held, that the plaintiff was entitled to dissolve the partnership as to B., but not as against the other partner (the son of B.), and that he was not entitled to dissolve it by notice under the 16th clause, without the concurrence of his co-partner (the son). That B. not having procured or endeavoured to procure, for the partnership firm the appointments to the several offices or clerkships, so as to give the plaintiff at the dissolution either a share of the profits of the offices or the chance of competing for them; but such appointments having been procured for B. and his son, to the exclusion of the plaintiff, B. and his son were not allowed to retain the offices for their exclusive benefit. That inasmuch as from the nature of the offices, they could not be sold, nor could any manager or receiver be appointed to carry them on, the defendants ought to be charged with the value of the offices in the partnership accounts. That the plaintiff having given a notice of dissolution (acting under the 16th clause), and his co-partner having adopted it, the partnership should be treated as dissolved from the time of the notice, although not with the consequences attaching to a dissolution under the 15th clause. That the consequences

of a dissolution under the 15th clause not having attached, the plaintiff therefore was not entitled to the injunction to restrain the defendant from practising within thirty miles. *Smith v. Neales*, 9 Hare, 556.

POWER OF APPOINTMENT.—*Exclusive Power*—*Attaining twenty-one.*—By a settlement made on the marriage of A. and B. real estate was conveyed to trustees and their heirs upon trust for A. for life, with remainder for B. for life; and after the death of the survivor, in trust, to apply the rents in the maintenance of all and every the children of A. and B. until such children should attain twenty-one; and when such children should attain twenty-one, to convey the premises to such children in such manner as A. and B. jointly, or the survivor should appoint; and in default of appointment, to convey the premises to such children equally, as tenants in common; and if there should be but one such child who should attain twenty-one, to convey the premises to such child, his or her heirs and assigns: Held, that the power of appointment was not an exclusive one, and that in default of appointment, all the children took the property as tenants in common in fee, without reference to their attaining twenty-one or surviving their parents. *Strutt v. Braithwaite*, 21 Law J. (N.S.) Chan. 609.

PRACTICE.—1. *Decree—Default at hearing.*—Since the general Order xlv. of August, 1841, which directs that a decree against a defendant who makes default at the hearing, shall be absolute in the first instance, without giving him a day to show cause, the practice has been, notwithstanding the default of the defendant, to hear the cause and make such a decree as the plaintiff upon the pleadings and evidence is entitled to, and not as heretofore, to allow the plaintiff to take such a decree as he can abide by. *Hakewell v. Webber*, 9 Hare, 541.

2. *Joint-stock Company—Winding-up Acts.*—The general rule of practice of the Court of Chancery, by which a successful appellant is not allowed the costs of his appeal, does not apply to proceedings under the Winding-up Acts, but the costs of all the proceedings are in the discretion of the Court. In a case where the official manager succeeded before the Master, and on appeal before the Vice-Chancellor, in obtaining the name of a party to be included in the list of contributories, but these decisions were ultimately reversed by the Lord Chancellor, the costs of all the proceedings, including the costs of the appeals and in the Master's office, were ordered to be paid by the official manager to the party sought to be charged. *In re The North of England Joint-stock Banking Company*, 1 D. M. & G. 1.

3. *Trustee—Wilful default.*—A bill was filed against trustees praying that the amount of the trust-fund, which the trustees had, or but for their wilful neglect or default might have received, might be ascertained. At the hearing the bill was dismissed as against one trustee, and the amount and particulars of the trust-fund were directed to be ascertained. Nothing was said about wilful default, nor did the trustee ask that the bill might be dismissed as to wilful

default. The Master made his report, which stated certain facts and reference to certain documents, from which it was alleged that it would appear that there had been wilful default. At the hearing upon further directions, a decree was made referring it to the Master to inquire whether the trustee could, with due diligence and without wilful neglect or default, have received more than a particular stated fund; but upon appeal it was held that the direction as to wilful default should be struck out of the decree. As a general rule, in order to obtain a direction for inquiry as to wilful default against an executor or trustee, the bill must allege a case, pray for it, and one case at least must be proved; and, *semble*, that if from admission or proof a suspicion arises whether wilful default has or not been committed, and it appears likely that further evidence can be obtained, the Court ought to direct an inquiry short of directing wilful default, but in such a way as to call the defendant's attention to it, with the view to ground thereon a new order at a future stage directing an inquiry as to wilful default. *Coope v. Carter*, 21 Law J. (N. S.) Chan. 570.

PREBENDARY. See LAND TAX REDEMPTION.

PRECATORY WORDS. See WILL, 9.

PRINCIPAL AND AGENT.—*Right of principal*.—It does not follow that because a principal is entitled to have an account taken in equity as against his agent, the agent has a similar right against his principal; for the right of the principal rests on the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal. The case in which a surety has a right to sue his principal in equity to be discharged from his liability is where the creditor has a right to sue his debtor and refuses to exercise that right. *Semble. Padwill v. Stanley*, 9 Hare, 627.

PRINCIPAL AND SURETY.—*Collateral security—Parol evidence*.—J. W. joined in a bond as surety, and the creditor subsequently took a promissory note from the principal debtor, payable in three months, for the balance due upon the bond. The principal debtor becoming insolvent and the note being unpaid, the creditor sued J. W. on the bond, who thereupon filed his bill for an injunction. It was proved that at the time of taking the note there was a general understanding between the principal debtor and the creditor that the remedies upon the bond should not be thereby affected: Held, that this general understanding amounted to a stipulation between the parties preventing the legal consequences that would have otherwise flowed from the transaction, and that the surety was not released. An agreement that a dealing between the creditor and principal debtor shall not operate as a discharge of the surety may be proved by parol evidence. *Wyke v. Rogers*, 21 Law J. (N. S.) Chan. 611.

PRIOR CLAIM. See MORTGAGE.

PROCEEDINGS AT LAW. See INJUNCTION.

PROMISSORY NOTE.—*Debt on legacy*—*Mortmain*.—A testatrix directed her executors to pay the debt which she owed to two persons named, and for the security of the payment of which she had given her promissory note. The promissory note was voluntary: Held, that whether this was a good debt, or whether it was a legacy, was a question for a court of law, and that it was not a case in which the Court could call in the assistance of a common-law judge, under the statute 14 & 15 Vict. c. 83, s. 8. The testatrix gave the residue of her estate to her trustees to be applied towards establishing a school: Held, that this gift was void under the Statute of Mortmain. *Longstaffe v. Rennison*, 21 Law J. (N. S.) Chan. 622.

PURCHASE.—*Specific performance*—*Statute of Limitations*.—On March 4, 1811, an agreement was entered into for the purchase of freehold land for 6,300*l.*, to be paid on the 13th of May, 1811, and the purchasers were immediately put into possession. In 1827, the purchaser, before any conveyance was made to him and before he had paid any part of the money, died, having devised the lands to trustees. The trustees disclaimed, and others were appointed by the Court of Chancery. In 1834, the attorney of these trustees wrote to the assignees of the vendor (who had become bankrupt), stating that the purchase-money was ready to be paid on the purchase being completed. On a bill filed by the assignees, in 1844, to enforce the lien, to which the Statute of Limitations, 3 & 4 Wm. 4, c. 27, was set up as a defence, by answer: Held, 1st, that the trustees were persons by whom the purchase-money was payable within the meaning of the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 40. 2nd. That the acknowledgment of their attorney, in 1834, was sufficient, within the meaning of the exception in the Act, to withdraw the case from its operation, and for this purpose to bind the *cestuis que trust*, although the trustees were appointed not by or under any powers contained in the will, but by the Court of Chancery. 3rd. That the answers claiming the benefit of the statute must be considered as alleging that no acknowledgment of the right to receive the money had been given or signed by the person by whom it was payable or his agents, and that therefore, although the bill did not allege any acknowledgment to have been made, the plaintiffs were entitled to put the acknowledgment in evidence on an appeal, although it was not read or proved at the original hearing. 4th. That this only applied to the trustees who had admitted the agency of the attorney, but that as against other defendants who had not made a similar admission, the assignees were entitled to an inquiry as to any acknowledgment having been given. *Toft v. Stephenson*, 1 D. M. & G. 28.

RAILWAY COMPANY.—1. *Approaches to station*—*Buildings*.—A provision in an Act for making a railway, that certain land to be purchased by the railway company should be appropriated to and used solely for the purposes of the railway and the buildings connected therewith, except such part as might be required by the

Board of Ordnance or for making approaches to the station, and should not be used or employed for erecting thereon any coke-ovens or for any other purposes (the necessary railway purposes only excepted), by which any nuisance might be created or the other property of the vendors in any way damaged, Held, to refer to the use of the land or the mode in which it was to be laid out or applied, and not to refer specially to the use of the buildings which might be erected upon the land. The buildings connected therewith did not mean buildings only connected locally with the railway, but meant buildings especially applicable to the uses of that particular railway, and that the construction of the clause was not to be governed by considerations of what would or would not be connected with other and different railways. That the building erected by the company being used as a custom-house for the examination of the luggage of passengers landing from the Continent, many of whom travelled by the railway, such user was for a purpose connected with the railway, and that the use being to some extent for such purpose, it did not cease to be so within the meaning of the provision, merely because all the purposes for which the building was used were not purposes connected with the railway. Where there is a parliamentary power to sell in fee, but with a restriction of the rights of ownership in the purchaser, and a conveyance to an owner in fee is made under such power, sound construction requires that the restriction imposed upon the purchaser who becomes the owner in fee shall not be extended beyond its necessary limits. *The Warden and Assistants of the Harbour of Dover v. The South-Eastern Railway Company*, 9 Hare, 489.

2. *Construction of lines.*—By three Acts of Parliament of the same session a railway company was empowered to make three distinct lines, forming a cluster and not a continuous line. In the next session an Act was passed declaring the company to have been and to be only one company, and authorizing and requiring them to grant a lease of the lines to another company. They completed only one of the lines, which was worked by the other company under the provisions of the last Act. Some months after it was obvious that the other two lines could not be completed within the time prescribed by the Acts, a shareholder in the first company filed a bill seeking to restrain it from applying its funds otherwise than for the purposes of constructing all three of the lines; but he did not make the company, who were lessees, parties to the suit: Held, that more inconvenience would arise from the Court interfering than from its abstaining to do so; and on this account, as well as on the grounds of acquiescence and want of parties, an injunction granted by the Court below was dissolved. *Quere*, whether railways forming a cluster differ from a continuous line with respect to the propriety of granting an injunction against the construction of part only of an undertaking authorized by the Legislature. *Hodgson v. Earl of Powis*, 1 D. M. & G. 6.

RECEIVER. See ADVOWSON.

REVERSION. See **CONTRACT FOR SALE.**

SOLICITOR.—Costs—Taxation.—Under the Solicitors Act items struck out of a bill of costs on taxation as not chargeable against the person to whom the bill is delivered, must be taken into account in determining the costs of taxation. An attorney delivering a bill of costs to a client, comprising the costs of an unsuccessful and desperate action of replevin, which the attorney has brought, not in the name of the client, but (as the attorney alleged) by the client's directions, the evidence adduced to prove this allegation was held by the Court to be insufficient: Held, that the item could not be allowed, and *semble* that it could not be enough for the attorney to prove the direction to have been given, without also proving that he had properly advised the client as to the desperate character of the proceeding. *Semble*, that it was within the functions of the taxing officer to require proof of such direction and of such advice having been given, before he allowed an item in respect of the action. Where the Court concurred in opinion upon the effect of the evidence as it stood, and only differed upon the question whether the appellant should have an opportunity of proceeding at law: Held, that the appeal ought to be dismissed with costs. *Quere* how far an attorney is justified, as between him and his client, by the opinion of counsel in prosecuting an action which is unsuccessful, and which the Court considers to have been groundless. *In re Clark*, 1 D. M. & G. 43.

SPECIFIC PERFORMANCE. See **PURCHASE.****TAXATION.** See **SOLICITOR.**

TITHE COMMUTATION ACT.—*Merger of tithes.*—The enactment of the Tithe Commutation Amendment Act (9 & 10 Vict. c. 73, s. 19), that every instrument purporting to merge any tithes, and made with the consent of the Tithe Commissioners, shall be absolutely confirmed and made valid, both at law and in equity, in all respects, is not limited to cases in which the person executing the instrument has a title to the tithe, but operates as well where such person has no estate in the tithe as where his estate is insufficient to effect the merger. The intention of the Commutation Acts is, that the lands on which the apportionment of the tithe in each parish is cast, and those lands only, shall be liable in respect of tithe payable for any lands; and that lands on which no apportionment is cast shall not be liable to tithe lands, which on the agreement and apportionment, under the Tithe Commutation Acts (confirmed by the Tithe Commissioners), are treated as free from tithe, cannot be afterwards made subject to tithe. The intention of the Legislature was to preclude all question of merger of tithe in all cases where declarations of merger had been made with the consent of the Tithe Commissioners, leaving the parties affected by any erroneous declaration to their remedy against the party making it; and such being the intention, the merger is effected although the sanction of the commissioners has been erroneously given. *Walker v. Bentley*, 9 Hare, 629.

TRUSTEE. — *Unauthorized management of trust.* — J. H. being possessed of the moiety of an estate in Jamaica, by his will appointed J. P. his executor and trustee, with power to manage, conduct, carry on, and improve his estate. In 1830 J. P. took a lease of the other moiety, and covenanted to keep it in the same cultivation, order, repair, and condition, and thenceforward managed the entirety on account of the trust estate. In 1835, in a suit by the *cestuis que trust*, under the will of J. H. Paley and Co., where an order of court appointed managers and receivers, and both moieties were managed for the trust estate until 1842, no rent had been paid since 1835, and the estate was in a state of utter ruin. Upon petition in the cause by the owners of the other moiety: Held, that though the taking of the lease was not authorized by the will, yet as it was concurred in by the *cestuis que trust* and sanctioned by the Court, and had proved beneficial to the trust estate, it must be considered as binding on the *cestuis que trust*, and that the trust estate was liable for the rent in arrear and the dilapidations. *Neate v. Pink, ex parte Fletcher v. Yates*, 21 Law J. (N. S.) Chan. 574.

WELLS CATHEDRAL.—See LAND TAX REDEMPTION.

WILL.—1. *Bequest—Share of residue—Children—Maintenance.* —A bequest of a share of residuary personal estate in trust for A. for life, and after the decease of A., for his children equally, to be vested interests in such children at twenty-one, with power to apply the income for their maintenance during their minorities, and a gift over in default of such children, and a proviso that if A. should in any manner sell, assign, transfer, incur, or otherwise dispose of or anticipate his share or any part thereof, then immediately after such alienation, sale, assignment, transfer, or disposition, the bequest in trust for A. should cease, determine, and become utterly void, as if the same had not been mentioned in the will, or as if A. were dead. A. being in prison for debt presented a petition for his discharge under the Act 1 & 2 Vict. c. 110, and thereupon the vesting order was made: Held, that there was a valid limitation over of the share of A.; that taking the benefit of the Insolvent Act was a voluntary alienation of his share by A., and was the event, or one of the events, on which the limitation over was to take effect; that the declaration in the will, that the gift thereupon should be void as if the same had not been mentioned in the will, applied to the event of there being no children, and the declaration that it should be void as if A. were dead, to the event of there being children; that although the limitation over took effect, the capital was not to be necessarily forthwith divided, for the determination of the life-interest did not alter the class which was to take, and which class included afterborn children; that the children of the insolvent who had attained twenty-one had a vested interest in their respective shares of the residuary share bequeathed in trust for the insolvent, and had become entitled to receive the interest of the same, and that the infant children of the insolvent were entitled to contingent interests in their respective

shares thereof, and that both interests were subject to the interests of any afterborn children of the insolvent who may become entitled. *Rochford v. Hackman*, 9 Hare, 475.

2. *Bequest of year's wages.*—A bequest of a year's wages to each of the servants of the testator living with him at his decease who should then have lived three years in his service, Held, not to exclude servants of the testator living in a different house from that in which the testator lived, but to exclude those not hired by the year; and held, therefore, that a gardener employed at weekly wages (although paid at irregular intervals) was not entitled to the benefit of the bequest. *Blackwell v. Tennant*, 9 Hare, 551.

3. *Condition—Substitution—Construction.*—A testatrix gave her real and personal estate to trustees in trust for her niece for life, and after the decease of her niece, without issue (which happened), and of her niece's mother, she directed the real estate to be converted; and as to one moiety of her residuary estate, she gave it amongst the child and children of A. A., and the issue then living of any child or children of A. A. dying in the lifetime of the niece, and to their respective executors, administrators, and assigns; and in case all or any of the children of A. A. should die without issue in the lifetime of the niece, the share of him or her or them so dying was to go amongst the child and children of M. H. living at the decease of the niece, and to their respective executors, administrators, and assigns. The niece died in 1830, unmarried, and without issue, having by her will given her personal estate to her mother, who died in 1850. A. A. had seven children, but two alone, H. C. and M. H., married and had issue; H. C. was alive at the date of the will, but died in 1847, leaving J. C., her husband, and J. A. C. and R. L., her two only children; M. H. died in 1820, in the life of the testatrix, and of both the niece and her mother; seven of the children were still living, and this moiety of the residuary estate was claimed by J. C. as the husband and personal representative of H. C., by J. A. C. and R. L. as children of H. C., by the children of M. H., and the personal representative of the niece: Held, as to one half of this moiety that the children of M. H. were entitled; and as to the other half of the moiety, that it was undisposed of, and passed to the next of kin of the testatrix. *Coulthurst v. Carter*, 21 Law J. (N. S.) Chan. 555.

4. *Construction—Condition.*—An estate was settled to such uses as W. D., a *feme covert*, should by deed or will appoint. W. D. devised the estate to R. D., her husband, with power to sell and dispose of the same, and to raise any sum or sums of money thereon, by mortgage or otherwise, as he should think proper, but with this proviso: "Provided, and these presents are upon this express condition, that such part of all and every sum and sums of money as aforesaid, raised by the said R. D., either by sale or mortgage, as shall be unexpended at my [his] decease, shall be charged upon the house belonging to the said R. D., situated at, &c., to be disposed of immediately after the decease of the said R. D.; that is to say, that that sum shall be paid to my four nieces, share and share alike." And in

case the estate should not be mortgaged to its full value, the testatrix devised the reversion to her said four nieces; and in case the estate should not be sold or mortgaged by R. D., she devised the same to her four nieces, and their heirs as tenants in common. R. D. mortgaged the estate, and died without having made any charge of the mortgage-money, or any part thereof, upon his houses: Held, that the condition was not a condition precedent, and that the mortgages made by R. D. were valid. Tenants in common, plaintiffs in a suit for redemption, are not entitled to a decree for partition in the same suit against the will of the mortgagee. *Watkins v. Williams*, 21 Law J. (N. S.) Chan. 601.

5. *Construction—Remoteness—Word “vested.”*—A testator directed trustees to pay the interest of a sum of 1,000*l.* to A. for life, and after her death to divide the principal between the child and children of A., and if there should be only one child, then the whole to such a child, to be a vested interest, or vested interests, on their respectively attaining the age of thirty years, and directed that if any child should die under thirty years without lawful issue, the share of him or her so dying should go to the survivors or survivor, and become vested at the same time as their original shares. B., one of the children of A., died in the lifetime of A. under thirty years of age: Held, that the gift to B., as one of the children of A., was a valid bequest, and that the gift over on the death of B. without issue was void for remoteness, and therefore that the representatives of B. were entitled to a share of the fund. *Taylor v. Frobisher*, 21 L. J. (N. S.) Chan. 605.

6. *Gift to children.*—Where a gift to children is not made or secured to them out of the property springing from or settled upon their parents, and there is nothing in the nature or context of the instrument to impress upon the gift the character of a portion, it is not a portion within the meaning of the 2nd section of the *Thelluson Act*; and the circumstance that the gift is a part of the estate of which the parent is the residuary legatee, has not the effect of giving the gift the character of a portion. There is no reason, and it is contrary to the policy of the *Thelluson Act*, to put a strained or forced construction on the term “portions for children” contained in the 2nd section of that Act. Under the *Thelluson Act* the residuary legatee was held to be entitled, at the expiration of twenty-one years, to the accumulations of a legacy given to the children of the testatrix's brother, and directed to be divided amongst them when they should attain twenty-one. *Jones v. Maggs*, 9 Hare, 605.

7. *Residuary bequests.*—A testator bequeathed his residuary personal estate (after a life interest) to his grandson, to and for his own use; but if he should die under twenty-one without leaving lawful issue, or if he should attain twenty-one and die without leaving issue and without having disposed of the same by his will or otherwise, then over: Held, upon the construction of the whole will, that in the event (which happened) of the grandson attaining twenty-one, he took an absolute interest. *In re John Baker*, 1 D. M. & G. 53.

8. *Residuary estate*.—Residuary estate, consisting of money in the Funds, was bequeathed to a mother and daughter, in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of the daughter's marriage, the daughter assigned her interest under the will to trustees upon trust for the issue of the intended marriage, and for a niece of the daughter, and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death: Held, that even if the settlement was voluntary as regarded the trusts in favour of the niece, it was a complete alienation so as to be capable of enforcement at the instance of the trustees of the settlement against the daughter and the trustees of another settlement which she made upon a second marriage, inconsistent with the former settlement. *Quere* whether the first settlement was voluntary as regarded the trust for the niece. *Kekewich v. Manning*, 1 D. M. & G. 176.

9. *Precatory words—Absolute bequest*.—A testator by his will bequeathed all his property, of whatsoever description, to his wife, her executors, administrators, and assigns, to and for their use and benefit, upon the fullest trust and confidence reposed in her that she would dispose of the same to and for the joint benefit of herself and his children: Held, that the widow of the testator was entitled to have the entire residuary property transferred and paid to her for her own use and benefit. *Webb v. Woolls*, 21 Law J. (N. S.) Chan. 625.

10. *Sale under—Completion of contract—Disputed will*.—On a sale of real estate by a trustee under a will open to suspicion as having been obtained by undue influence, the title was approved; but before the actual completion of the contract the heir-at-law gave notice that he intended to dispute the will, and brought an action against the tenant for rent, the purchaser thereupon refused to complete, and a bill for specific performance was filed, but before it came to a hearing the action brought by the heir was tried and a verdict given against the heir; a reference as to title was then directed, and the Master having reported in favour of the title, a decree was made for specific performance. On appeal, however, by the purchaser, the Lord Chancellor (Lord Cottenham) ordered the case to stand over generally, with liberty for the vendor to take such proceedings for establishing the will as he should be advised. The vendor then instituted a suit against the heir, which resulted in the will being established. The Lord Chancellor (Lord Truro) thereupon confirmed the decree for specific performance, and directed the purchaser to pay interest from the time when, under the contract, the sale ought to have been completed; and also to pay the costs of the suit subsequently to the hearing. When the reference as to title was directed, his Lordship held that at that time there had been such reasonable inquiry into the title as ought to have satisfied the purchaser, and that therefore the consequences of the further proceedings by which the will was established, both in reference to the costs of the suit for

specific performance and the payment of interest, must fall on the purchaser. The judgment of Lord Cottenham in this case 2 Phil. 619, observed upon. *Grove v. Bastard*, 1 D. M. & G. 69.

11. *Vesting—Substitution*.—A testator, who died in June, 1837, by a will made in 1839, directed, after the decease of his wife, that one moiety of his residuary estates should be divided into five equal parts, which he gave to five several parties, whom he named, and in case of the death of any or either of them before his wife, then their respective shares to go to their respective husbands or wives, and if none, to their respective children, and in failure of children, to the survivors of them, share and share alike; and as to the other moiety, he gave 10l. thereof to A. E. should she be then living; and as to the remainder of the moiety, he gave it to five parties, whom he named; and in case of the death of any or either of them, then their respective shares to their children; and if none, then to the survivors of them, share and share alike. The testator's widow died in 1849. It appeared from the inquiries directed as to the first moiety, that all the five persons named as legatees were alive at the date of the will, three died in the lifetime of the testator, leaving children, six of whom were still living and defendants to this suit. The remaining two legatees survived the testator, but died before the tenant for life. They both left children, seven of whom were now living and defendants to this suit. As to the second moiety, A. S., one of the legatees, died before the date of the will, leaving four children, all now living, defendants to this suit. Two others died in the lifetime of the testator, one without issue and the other leaving children, two of whom are now alive and defendants to this suit; and H. K., the fifth legatee, was the only one of the legatees named in the will who had survived the tenant for life: Held, that the legatees took as tenants in common; that children of legatees who would have taken if they had survived the tenant for life, were entitled to their parents' share; that the gift to A. S., who was dead at the date of the will, and in case of her death to her children, passed her share to her children who were living at the death of the tenant for life; that the legal personal representative of a son of one of the legatees was entitled to participate with the other children of the legatee; that the children of a deceased legatee took vested interests in the parent's share whenever the class of those children was ascertained; and that upon the death of C. R., one of the legatees of the second moiety, in the lifetime of the testator, the other legatees then living took vested interests in his share. *Ive v. King*, 21 Law J. (N.S.) Chan. 560.

WINDING UP. See COMPANY, 2.

WITNESS.—1. *Commission to examine*.—The Court having directed a commission to issue for the examination of witnesses upon the certificate of the Master, and that commission having miscarried by reason of the defendant being deprived of an opportunity of cross-examining the plaintiff's witnesses, a new commission was directed by the Court

to issue without any further certificate of the Master. *Forsyth v. Ellice*, 21 Law J. (N. S.) Chan. 590.

2. *Foreign commission—Expenses.*—A testator gave the residue of his property to be held in deposit for the purpose of inquiring whether there were any relations of his blood living, and if so, the said residue was to be divided equally among them. Upon a reference to the Master to make inquiries in conforming with the above residuary bequest, the Master reported that a commission ought to be sent to Venice to examine witnesses as to who were the next of kin. The Court upon the application of the executors made an order for a foreign commission, and also directed what sum should be allowed out of the testator's property for the expenses of the commission. *Heath v. Chapman*, 21 Law J. (N. S.) Chan. 614.

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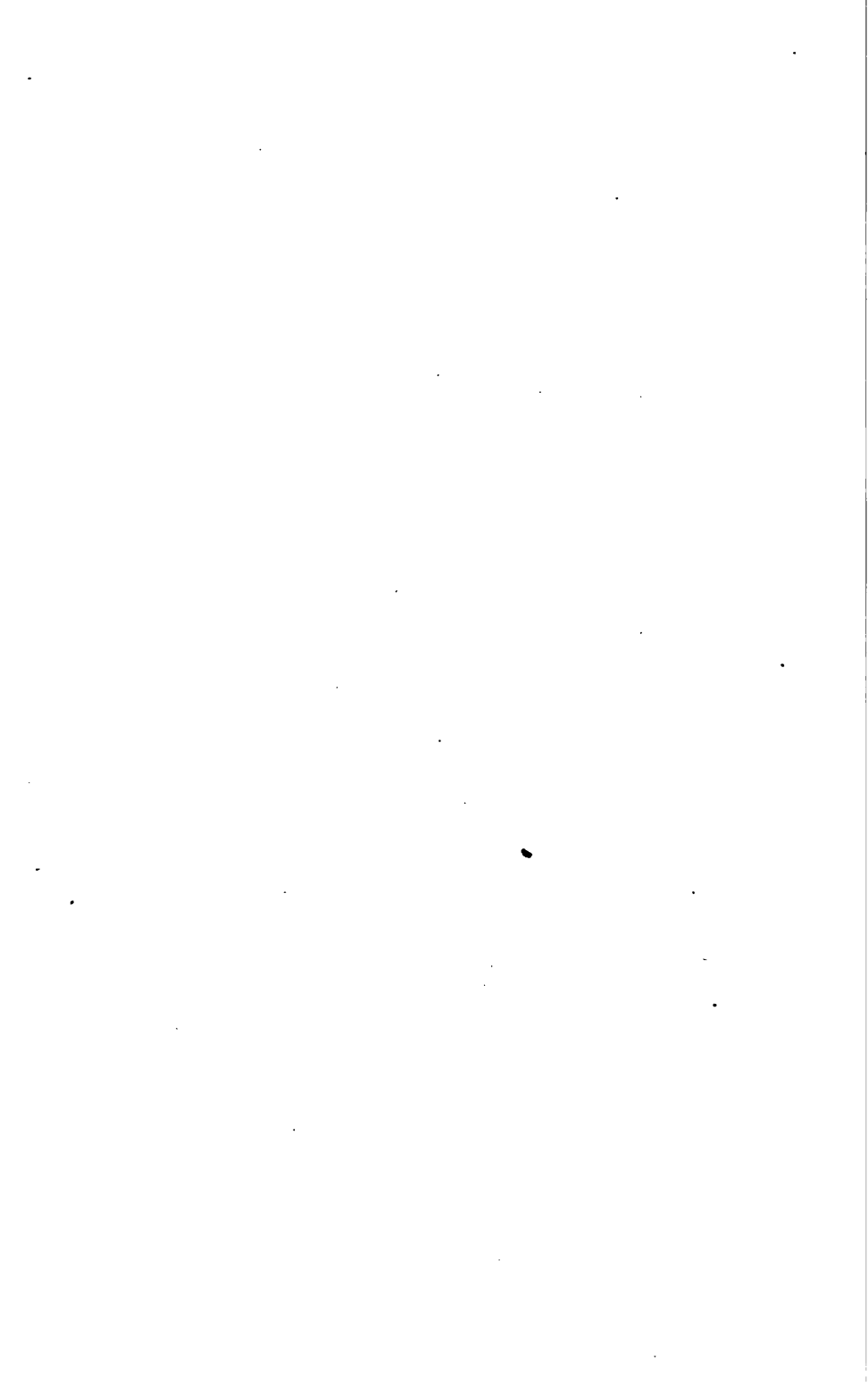
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ACTION.—1. *Bondholder under local Act—Creditors to be equally entitled*—6 & 7 Wm. 4, c. 112.—The Herne Bay Pier Act (6 & 7 Wm. 4, c. 112), by section 9, enables the company to borrow money on bond, under their common seal, and the money is to be made payable in such manner, at such time, and at such rate of interest as they shall think proper; and the rents and profits of the undertaking are to be a security for the money so borrowed with interest, and all bondholders shall be equally entitled to a claim or lien on the said rents and profits in proportion to the sums thereby secured, and without any preference by reason of the priority of date of any such securities, or any other account whatever: Held, that this clause did not prevent a creditor, to whom the company had given a bond under their common seal, conditioned for the payment of the principal money at a fixed day, and interest in the mean time, from suing the company for the penalty of that bond; the clause at the end of the section only applying to prevent a creditor recovering under his judgment in preference to others. *Bolckow and another v. The Herne Bay Pier Company*, 22 Law J. (N. S.) Q. B. 33.

2. *Company—Shares—Registering—Transfer—Pleading—Reasonable time.*—A declaration alleged that N., who appeared by "the registry of shareholders" to be the holder of 300 shares, transferred them to the plaintiff, and that the plaintiff delivered the deed of transfer to the defendants for the purpose of entering a memorial of it in "the register of transfers," and required the defendants to make such entry. Breach, that the defendants did not make such entry, whereby the plaintiff was deprived of his right to appear in the

books of the company as a shareholder, and by reason of N. still appearing to be the holder of the said shares, and failing to pay calls made on him after the delivery of the transfer to the defendants, the defendants forfeited the said shares, and confirmed the forfeiture and sold the shares. The second count alleged that the plaintiff was the lawful holder of and entitled to 300 shares, and that the defendants wrongfully, and in pretended exercise of the powers of the Companies' Consolidation Act, declared the said shares forfeited, and confirmed the said forfeiture and sold the said shares, alleging special damage: Held, that the declaration showed a good cause of action, and that it was not necessary in the first count to allege that a reasonable time had elapsed before the commencement of the suit. *Catchpole v. Ambergate, Nottingham, and Boston Eastern Junction Railway Company*, 22 Law J. (N. S.) Q. B. 35.

3. *Covenant—Lease—Ruinous condition.*—In covenant on an indenture of lease, the declaration alleged for breach, that the defendant, during the term by the indenture created, to wit, on such a day, and from thence continually for a long time, to wit, from thence hitherto, suffered the premises, and every part thereof, to be and continue, and the same were for and during all that time ruinous and out of repair, &c. Plea, that the defendant did not, during the term by the indenture created, suffer the premises or any part thereof, to be or continue, nor were the same for or during all the said time, ruinous and out of repair, &c.: Held, that the traverse was too large. *Aldis and another v. Mason*, 11 C. B. 132.

AMENDMENT.—*Ejectment—Variance.*—The declaration in ejectment stated a joint demise by H. and M. his wife. Proof, that H. was devisee in trust for the sole use of all: Held, that the judge had no power, under the 3 & 4 Wm. 4, c. 42, s. 23, to amend the record by striking out the name of M. in the demise. *Semble* (per Maule, J.), that the variance was in a particular material to the merits. *Doe d. Wilton and Uxor v. Beck and others*, 22 Law J. (N. S.) C. B. 7.

ANNUITY BOND. See PLEADING.

ARBITRATION.—1. *Award to pay debt and costs, and repay costs of award—Demand of three sums—Attachment for two.*—An award ordered H. to pay on a day and at a place named to the attorney of C. for C.'s use, one sum for debt and another for C.'s costs of the reference, and then directed that C. should pay to the arbitrator's attorney, at or before the delivery of the award, 62*l.* 10*s.* for the costs of the arbitrator and of the award, and that H. should on a day, at a place named, repay the said sum of 62*l.* 10*s.* to the attorney of C. for C.'s use. H. not complying with the award, a demand was duly made on him on C.'s behalf for payment of the three specific sums, but H. did not pay any of them. On an application by C. against H. for an attachment for not paying the three sums: Held, that assuming the direction to pay the 62*l.* 10*s.* to be valid, no attachment could issue in respect of that sum, as it was not

shown that C. had paid it in the first instance for the arbitrator's use, but that the Court could mould the rule, and that the attachment might issue in respect of the other two sums. *Earl of Cardigan v. Henderson*, 22 Law J. (N. S.) Q. B. 83.

2. *Costs of cause—Specific finding.*—Where matters in difference in a cause involving several issues are referred to arbitration, the costs of the cause to abide the event, the award is good, notwithstanding there is no specific finding on each issue, if it appears by necessary intendment that the arbitrator has disposed of all the issues. *Semble*, that it is otherwise where the reference is of the cause, and also of matters in difference. *Humphreys and another v. Pearce*, 7 Exch. 696.

ASSESSED TAXES. See PARLIAMENT.

ASSURANCE—Policy of—Statement not amounting to a warranty.—A policy of assurance against any loss by the want of integrity, honesty, or fidelity of one R. W. in his employment as secretary to the Marylebone Literary and Scientific Institution, was granted by the defendants to the plaintiff. The basis of the contract was recited to be a statement in writing by the treasurer of the institution lodged at the office of the company, containing a declaration of the truth of the answers that had been given to the questions contained in the proposal for the policy; and there was a proviso, that any fraudulent misstatement or suppression in that declaration should render the policy void from the beginning. The statement referred to contained (*inter alia*) the following questions and answers: "In what capacity do you intend to employ the applicant; and with reference to this question, will you state, as far as circumstances will permit, the nature of his intended duties and responsibilities?"—"He is secretary of the ——— Literary Institution, of which I am treasurer." "The checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed?"—"Examined by finance committee every fortnight." Held, that this statement, that the accounts of R. W. would be examined once a fortnight by the finance committee of the institution, did not amount to a warranty, and that the defendants were liable upon the policy for a loss occasioned in consequence of the finance committee neglecting to examine his accounts in the manner specified. *Benham v. The United Guarantee Life Assurance Company*, 21 Law J. (N. S.) Exch. 316.

ATTACHMENT. See ARBITRATION.

ATTORNEY AND SOLICITOR.—Bill of costs—Stating venue of the court.—Where an attorney's bill of costs, delivered under the 6 & 7 Vict. c. 73, s. 37, contains items applicable to proceedings in the superior courts of law, but does not contain any statement from which it can be inferred in which of those courts the business was transacted, the bill is to be presumed to be a compliance with that Act, unless the party charged thereby proves that any further infor-

mation was practically required for the purpose of taxation, or shows that the venue of the court in which the business was done would have been of use to him. The reason for requiring the venue of the court to be stated, which prevailed under the 2 Geo. 3, c. 23, does not exist since the scale of allowance has become uniform in all the superior courts of law: *Semble*, that a bill of costs, which is defective as to part of its items contained in it, may be good as to the residue, so as to entitle the attorney to recover the amount as to which a sufficient bill of costs has been delivered. *Cooke v. Gillard*, 22 Law J. (N. S.) Q. B. 90.

AWARD. See ARBITRATION.

BAIL.—1. *Mayor's Court of London—Removal of cause.*—The general rule, that where an action against an executor is removed from an inferior court, the defendant is not bound to put in special bail, does not extend to the case of an inferior court where a custom of foreign attachment exists, which can only be dissolved on putting in special bail. *Bastow v. Gant, administrator*, 21 Law J. (N. S.) Q. B. 377.

2. *Money paid into court in lieu of bail—Delay in perfecting bail—Taking money out of court.*—The defendant, who had been arrested on *mesne process* in an action for a debt, deposited with the sheriff the amount claimed, together with 10*l.* for costs in lieu of bail, and the sheriff paid the amount into court. The defendant afterwards put in and perfected bail, but not in due time: Held (on an application to the Court by the defendant, supported by an affidavit of merits), that the defendant was entitled to have the money paid out to him, and that the plaintiff was not entitled to elect whether he would take the security of the bail or of the money. *Brook v. Brook*, 22 Law J. (N. S.) Q. B. 81.

BANKRUPT.—1. *Act of bankruptcy—Mortgage of machinery.*—Where a trader assigns part of his property by way of mortgage, the question under the Bankrupt Laws is not, whether the putting the deed in force will put an end to his business, but whether it will make him insolvent. A manufacturer assigned all his machinery, by way of mortgage, to secure the amount of certain bills drawn by him and accepted by the consignees of his goods, which had been discounted by the mortgagee, and also of such other bills as should from time to time be discounted in like manner. The mortgagee was empowered, after three days' notice, to enter and take possession of all the machinery, and after a sale of the same to pay the amount of the expenses and the bills then due or running, and to pay the surplus to the mortgagor. At the time of the execution of this deed, the machinery was worth 1,500*l.*, and the mortgagor's property consisted of goods worth 1,100*l.*, and good debts 900*l.*, while his whole liabilities were 2,900*l.*: Held, that this deed was no evidence of an act of bankruptcy; although, had it been acted upon, the mortgagor could not have carried on the particular business in which he was

engaged. *Young and others, assignees of Normington, v. Waud*, 22 Law J. (N. S.) Exch. 27.

2. *Same—Advance to pay off debt—Assignment to secure advance—Power to sell future property.*—Y., a trader, agreed to make an assignment of all her property in business to C., in consideration of his paying a debt then due by Y. to L. The debt was paid by C. directly to L., and an assignment of all Y.'s property to C. afterwards executed to secure the repayment of the amount of such debt with interest. The assignment contained a covenant, that in default of the repayment by Y. in the manner specified in the deed, it should be lawful for C. to possess himself of as well all the property assigned as also all other property that might afterwards during the continuance of the security be upon the premises in which Y. carried on her business; and to sell and dispose of the same, and reimburse himself the debt and interest, and all expenses, and pay Y. The assignment also provided that Y. should continue in possession of the property until default in repayment; and subsequently, Y. being unable to pay, sold the property, and out of the proceeds repaid the sum advanced by C., and afterwards became bankrupt: Held, in an action by the assignees of Y. to recover back the sum repaid by her to C., the jury having expressly found that the assignment was to be considered as made in consequence of, and to secure, a present advance by C. to the bankrupt, of which the bankrupt had the full benefit at the time; and did not therefore in itself amount to an act of bankruptcy, although it contained a covenant enabling C. to take and dispose of future-acquired property. *Hutton and another, assignees of Youdall, v. Cruttwell*, 22 Law J. (N. S.) Q. B. 78.

BANKRUPT CONSOLIDATION ACT.—1. *Contingent debt—Certificate—Surety.*—The defendant executed a bond whereby he became liable, as a surety, to pay to the plaintiff such costs as the plaintiff should in due course of law be liable to pay in case a verdict should pass for certain defendants in an action of *scire facias*, wherein the now plaintiff sued as a nominal party. The action on the *scire facias* was tried at the Spring Assizes in 1848, and a verdict was found for the then defendants, after which, in Easter Term, a rule *nisi* for a new trial was obtained. In the November following, the defendant in the present action became a bankrupt. In Hilary Term, 1849, the rule for a new trial was discharged. In May the defendant obtained his certificate; and in August the costs in the action on *scire facias* were taxed, and final judgment signed against the now plaintiff: Held, that the plaintiff's claim was not barred by the defendant's certificate, the debt not being a contingent debt, within the 6 Geo. 4, c. 16, s. 56, but only a contingent liability. *Hankin v. Bennet*, 21 Law J. (N. S.) Exch. 326.

2. *Deed of composition.*—To *assumpsit* on bills of exchange the defendants pleaded, that being joint-traders by deed under the 12 & 13 Vict. c. 116, s. 224, they assigned their joint property to M., who

undertook to pay their joint creditors 7s. 6d. in the pound; that six-sevenths of the creditors accepted and executed the deed, and the defendants were thereby released from the plaintiffs' claim. The plaintiffs replied, after setting out the deed on oyer, that each of the defendants had separate property. The replication was held good, on the authority of *Tetley v. Taylor* in error. *Fisher and another v. Bell and another*, 21 Law J. (N. S.) C. B. 228.

BILL OF EXCHANGE.—1. *Action by indorsee against acceptor.*—In an action by an indorsee against the accommodation acceptor of a bill, it is not a good defence to the further maintenance, that after action brought the drawer paid the amount of the bill and interest to the indorsee under a judge's order in another action brought by the indorsee against the drawer. *Randall v. Moon*, 21 Law J. (N. S.) C. B. 227.

2. *Indorsee—Payment after action.*—The indorsee of a bill of exchange is entitled to proceed in an action against the acceptor, for the recovery of costs, though, pending the action, payment in full satisfaction of the amount of the bill, with interest and all moneys due thereon, be made by another party to the bill, and accepted by the plaintiff. When, therefore, to a declaration against the acceptor of a bill of exchange for 49l. 16s., indorsed by W. T. to the plaintiff, the defendant pleaded, 1st, *non accepit*; 2ndly (*puis darrien continuance*), that after the pleading of the first plea, W. T. had paid to the plaintiff, then being the holder of the bill, and the plaintiff had accepted 60l., being the full amount of the bill and all interest due thereon, in full satisfaction and discharge of the said bill and of all moneys due and payable on account and in respect thereof: Held on demurrer, that the plea was no bar to the further continuance of the action. *Goodwin v. Cremer*, 22 Law J. (N. S.) Q. B. 31.

3. *Plea of infancy—Evidence as to time of acceptance.*—To an action by an indorsee against the acceptor of a bill of exchange at four months, dated the 9th of November, 1850, the defendant pleaded that he was an infant when he accepted. It was proved that the acceptance, which was not dated, was written by the defendant; that all parties to the bill resided in London; and that the defendant came of age on the 11th March, 1851: Held, that the jury might, on this evidence, find for the defendant, as the proper inference for it was that the bill was accepted shortly after it was drawn. *Roberts v. Bethell*, 22 Law J. (N. S.) C. B. 69.

BOND.—*Joint-stock company—Stamp—Denoting-stamp.*—By a bond, A., B., and C. bound themselves in the penal sum of 600l. to a joint-stock company. This bond, after reciting that A. and B. had agreed to join with C. and his sureties, subject to the conditions thereafter contained, in consideration of the company then advancing C. the sum of 300l., contained the following conditions: That if any of the said bounden parties should pay to the company the principal sum of 300l. by three equal yearly payments of 100l. each (on specified days), or so much of the said payments as should be owing on the day of the decease of C., which should first happen;

and should in the mean time, until the principal sum should so become due, and until it should be all paid, pay the company interest at the rate of 5l. per cent. upon the said principal sum of 300l., in equal half-yearly payments (on specified days), and that they also should in the mean time, and until the principal sum of 300l. should become due, and until the same with interest should be fully paid, well and truly pay the annual premiums, which should, during the continuance of the loan, become payable on a certain policy of assurance, under the hands of three of the directors of the company, whereby the funds of the company were, on payment by C. or his assigns during his life, of the annual premium of 23l. 14s. 7d., made liable to pay C.'s executors, &c., after his decease the sum of 499l. 10s., which instrument had then been deposited as a collateral security for the payment of the principal sum of 300l., and interest thereon, and of the premiums which might be due and unpaid; provided the company might consider the policy as subsisting, notwithstanding any premium might not be paid, and if C. should not, during the continuance of the said loan, do any act by which the policy might be avoided; and in case either A. or B. should, during such time, die or go abroad, and if within a time therein mentioned either of them should obtain and substitute a new surety in the place of such surety so dying, &c., who should enter into a like bond, or in case A. or B. should give such additional security for the said principal sum, or so much as should then remain unpaid, and the interest thereof, or should forthwith pay upon demand the principal sum and interest, or so much as should be due; then the said bond was to be void, otherwise it was to remain in full force; provided that in case any of the events mentioned in the conditions indorsed on the policy should happen during the deposit of the policy, it should be considered as wholly void; and lastly, that if default should be made in payment of the interest, or of either of the instalments, or of the premiums according to the said stipulations, the whole of the principal should thereupon become payable: Held, per Pollock, C.B., Alderson, B., and Platt, B., that the bond secured the payment of the principal sum of 300l. with interest only, and that the bond was rightly stamped with a 3l. stamp, which covered the principal sum. Per Parke, B., that the bond secured the payment of the premiums also. Held, per *totam curiam*, that documents stamped with a "denoting" stamp by the commissioners, under the 13 & 14 Vict. c. 97, s. 14, cannot be objected to when tendered in evidence, as being improperly stamped: Held, also, that where in an action on a bond the instrument is objected to at the trial as being insufficiently stamped, and afterwards, but before the case is argued *in banc*, a denoting-stamp is affixed to it by the commissioners, such objection to the sufficiency of the first stamp is not thereby removed. *Prudential Mutual Assurance Investment and Loan Association v. Curson*, 8 Exch. 97.

BOROUGH FRANCHISE. See PARLIAMENT.

CARRIER.—*Personal luggage—Loss—Responsibility.*—A carrier

of passengers for hire is, at common law, only bound to carry their personal luggage; therefore, if a passenger has merchandise among his personal luggage, or so packed that the carrier has no notice that it is merchandise, he is not responsible for its loss. But if the merchandise is carried openly, or so packed that its nature is obvious, and the carrier does not object to it, he will be liable. Under the 6th section of the 7 & 8 Vict. c. 85, which allows each passenger by a parliamentary train to carry half a hundred-weight of luggage, a husband and wife travelling together are entitled to carry one hundred-weight. The luggage of a passenger by railway, though never delivered to any servant of the company, but kept by the passenger during the journey, is, nevertheless, in point of law, in the custody of the company, so as to render them responsible for its loss. *Great Northern Railway Company, appellants; Shepherd, respondent*, 8 Exch. 30.

CHANCERY PRACTICE AND PROCEDURE AMENDMENT ACT (15 & 16 Vict. c. 86, s. 61).—*Case from Chancery for opinion of Court of Law—Retrospectiveness—Rights of the Crown.*—The Chancery Practice Amendment Act (15 & 16 Vict. c. 86, s. 61), which takes from the Court of Chancery the power of sending cases for the opinion of a Court of Common Law, is not retrospective in its operation, so as to prevent the argument of a case sent before the 1st of November, 1852, the day of the Act coming into operation. *Quære*, whether that section applies to causes affecting the rights of the Crown? *Hobson v. Neale*, 22 Law J. (N. S.) Exch. 25.

CHURCH.—1. *Dilapidations—Action by rector—Liability of executors.*—The right of a succeeding rector to bring an action for dilapidations against the executor or administrator of his predecessor rests upon particular custom derived from ecclesiastical law, and it is an incident of such custom that the claim in respect of dilapidations is to be postponed in the distribution of assets to the payment of specialty and simple-contract debts. Where, therefore, to a declaration in case upon the custom, the defendant, an executor, pleaded that after the commencement of the suit, and before plea, he had paid and satisfied a bond debt and several other debts due from the testator at his death, and that at the commencement of the suit he had fully administered all the goods and chattels of the testator at the time of his death which had come to his hand to be administered, except goods and chattels of a value which were not sufficient to satisfy the said bond and other debts paid by the defendant: Held, on demurrer, that the plea was a good answer to the plaintiff's claim for dilapidations. *Bryan v. Clay*, 22 Law J. (N. S.) Q. B. 23.

2. *Union—Creation of new benefice—Conveyance of old advowson.*—A declaration in *quare impedit* stated that S. H. was seised in fee of a moiety of the advowson of the church of B. with D. and A., as in gross by itself, as of fee and right, and was entitled to present to the same every alternate turn, the other moiety of the said advowson belonging to the earl of B. Plea, "that S. H. was not seised of a

moiety of the advowson of the church of B. with D. and A.," &c.: Issue thereon. By a special verdict, it was found that before 1818 B. with D. was a parish and rectory, and A. a separate parish and vicarage. That the earl of B. was seised in fee of the advowson of the rectory of B. with D., and that R. G. was seised as of fee in gross of the advowson of the vicarage of A. That by an Act of Union in 1718 made on the petition and by the consent of the respective patrons and the incumbent (the same clerk being then incumbent of both benefices), the bishop did consolidate, unite, and annex the vicarage and parish church of A. to the rectory and parish church of B., and willed and decreed that the said united churches should from that time be thereafter held and reputed as one benefice only, and that one fit person, at the alternate presentation of the earl of B. and R. G. and their heirs, should be canonically instituted in the same, and that it should be lawful for the then incumbent and his successors to take possession of both parish churches, and them to continue and retain as one church and one benefice. By a deed of 1760, R. G.'s heir conveyed to S. H. "all that the perpetual advowson, nomination, donation, or alternate right of presentation and free disposition of and to the vicarage of the parish church of A.," &c.: Held, that by virtue of the Act of Union the two churches of B. with D. and A. were united, and a new presentative benefice was created and given, as provided in the Act of Union, to the owners of the former advowsons in turns; but that the old advowsons remained unchanged, and were to be conveyed as before, and that a conveyance of one of the old advowsons would carry with it the patronage of the alternate sums of the whole presentative benefice; consequently, that as the deed of 1760 conveyed to S. H. the advowson of the old vicarage of A., such conveyance conveyed also what was inseparably annexed,—a moiety of the advowson of the newly-created church of B. with D. and A. *Robinson and Uxor v. The Marquis of Bristol*, 22 Law J. (N. S.) C. B. 21.

COMPANY. — *Unilateral contract — Execution — Right to sue*, 7 & 8 Vict. c. 110, s. 44.—By a deed made between L. and his wife of the first part, the defendant of the second, the plaintiffs, a joint-stock company, of the third, and the trustees of the company of the fourth, in consideration of 200*l.* advanced to L. by the company on the execution, L. and the defendant covenanted to pay an annuity to the plaintiffs; and that L. should keep on foot a policy on his own life and one upon his wife's. L. and his wife further granted to the trustees their interest in certain freehold property upon trust, to pay thereout, by sale or otherwise, the arrears of the annuity, and pay over the surplus moneys received to the parties entitled thereto. In an action of covenant by the company against the defendant for the nonpayment of the annuity, and for not keeping on foot the policies, the defendant, after setting out the deed on oyer, pleaded that it was a contract made on behalf of a completely registered joint-stock company, under the 7 & 8 Vict. c. 110, s. 44, and that it was void because it was not executed with the formalities thereby required: Held, that

the plea was bad, the contract not being one made on behalf of the company, and being a unilateral one, on which the covenanted might sue without executing it. *British Empire Mutual Life Assurance Company v. Browne*, 22 Law J. (N. S.) C. B. 51.

And see ACTION, 2.

COMMON LAW PROCEDURE ACT. — 1. *Appearance sec. stat.* — Where an appearance *sec. stat.* has been entered before the 24th of October, when the 15 & 16 Vict. c. 76, came into operation, the 27th and 28th sections of that Act do not apply. Therefore, where a writ was issued on the 29th of September, upon which an appearance *sec. stat.* was entered on the 8th of October, a declaration filed with a notice to plead indorsed thereon, and no plea pleaded: Held, that judgment signed without any notice of filing the declaration having been given to the defendant was irregular, and the judgment and execution thereon were set aside. *Goodliffe v. Neaves*, 21 Law J. (N. S.) Exch. 338.

2. *Pleadings — Trespass de bonis asportatis.* — Pleadings specially demurred to before the Common Law Procedure Act, 15 & 16 Vict. c. 76, came into operation, are not affected by its provisions. To trespass *de bonis asportatis*, the defendant pleaded that by indenture of the 29th of July, 1847, it was agreed between Q. and the defendant, who then and during all the time thereafter mentioned was possessed of certain premises for a term unexpired therein, that Q. should hold the premises as tenant at will to the defendant at the yearly rent of 150*l.*, payable quarterly; for which rent it should be lawful for the defendant to distrain as landlords may for rent reserved on leases for years; that Q. held the premises under the indenture and agreement; that rent for three years and a quarter, during all which time Q. held the premises under the indenture as such tenant, and the defendant was possessed of them as aforesaid, became due, whereupon the defendant distrained the goods for rent. The plaintiff demurred, after setting out on oyer the indenture, whereby, after reciting that the premises in question were demised by M. to Q. for twenty-one years wanting one day, and that the defendant had consented to lend Q. 400*l.*, on the same being secured as thereafter mentioned, it was witnessed that Q. demised the premises by way of mortgage to the defendant at a peppercorn rent; and it was further agreed, that Q. should hold the premises as tenant at will to the defendant, at the yearly rent of 150*l.* with power of distress: Held, that the plea was bad for not alleging a seisin in fee in the defendant, or deducing a title so as to enable him to distrain the goods of the plaintiff, who neither was a party to the deed nor claimed under Q. *Pinhorn v. Souster*, 8 Exch. 138.

CONTRACT.—1. *Construction of pleading—Assignment of breach—Averments of request and refusal—Lapse of time.*—Declaration upon an agreement which stipulated, amongst other things, that it had been mutually agreed between the plaintiff and the defendant,—first, the plaintiff agreed that he would serve the defendant as a

manufacturer and assistant for the term of seven years at a salary of 100*l.* per annum, &c. ; 2nd, the defendant agreed to pay the said yearly salary, and if he should from any cause give up his business as a manufacturer, or not require the plaintiff's services, then that he would use his best endeavours to procure for the plaintiff employment in some similar business, and for which he would not receive less than 100*l.* per annum ; or in case he should be unable to do so, the defendant would pay the yearly salary of 100*l.* during the residue of the term of seven years. Averment of performance on the part of the plaintiff. Breach, that the defendant did not continue the plaintiff in his employ until the expiration of the seven years, but refused to do so, and wrongfully discharged the plaintiff therefrom without reasonable or probable cause. And further, that although the defendant had not continued the plaintiff in his employ, but had discharged him as aforesaid, yet the defendant did not use his best or any endeavours to procure, nor did he procure, the plaintiff employment in some similar business for which he received a salary of 100*l.* a year, but had wholly failed to find the plaintiff such employment. Plea, that at the time when the plaintiff was discharged, the defendant was, and thence hitherto had been, wholly unable to procure for the plaintiff any such employment as in the agreement mentioned : Held, upon demurrer, that the agreement did not leave it open to the defendant to pay the plaintiff after his discharge 100*l.* a year without first using any endeavours to obtain a situation for the plaintiff, but that the undertaking by the defendant to use his best endeavours to procure employment for the plaintiff in some similar business was a primary part of the agreement, which the defendant was bound to fulfil, and therefore that the second part of the breach was good. Held, also, that it was not necessary to aver a request by the plaintiff that the defendant would use his best endeavours : that the allegation of performance was sufficient without any averment of readiness and willingness ; and that the mode in which the breach was alleged rendered it unnecessary to aver that a reasonable time had elapsed. Held, further, that the plea raised an immaterial issue, and was bad on general demurrer. *Rust v. Nottidge*, 22 Law J. (N. S.) Q. B. 73.

2. *Pleading—Satisfaction*.—In an action for work done, the defendants pleaded that the work was done under an agreement made by the plaintiff with the defendants to build a church on certain terms ; that the plaintiff stopped the works until another agreement was entered into with T. P. for completing the work ; that T. P. paid the consideration-money under the second agreement, and that the plaintiff accepted the second agreement, and the performance thereof by T. P. in full satisfaction and discharge of the agreement between the plaintiff and defendant : Held, that this plea was bad in substance, because it did not show that the agreement and payment made by T. P. were made on behalf of the defendants, or that they adopted them, the case thereby being distinguishable from *Belshaw v. Bush* (1). *James v. Isaacs and others*, 22 Law J. (N. S.) C. B. 73.

COPYHOLD.—*Mandamus to admit—Claim as heir—Escheat.*—The Court will grant a *mandamus* to compel the lord of the manor to admit a person who claims as heir of a deceased copyholder, if he has made out a *prima facie* case of title by descent, according to the custom of the manor, even though the lord suggests that the teneement has escheated to himself for want of an heir. *Reg. v. Deady*, 22 Law J. (N. S.) Q. B. 39.

CORPORATION. See **USE AND OCCUPATION.**

COUNTY COURT.—1. *Jurisdiction—Custom.*—The County Courts are not precluded by the exception in the 58th section of the 9 & 10 Vict. c. 95, from trying a disputed custom. Therefore they have power to try a custom for the occupier of a wharf on a public navigable river, to cause vessels coming to his wharf to unload, to overlap the adjoining wharf of another. *Davis v. Walter and another*, 22 Law J. (N. S.) Exch. 25.

2. *Same—Contract with carrier.*—A carrier and wharfinger residing at Swindon in Wiltshire, agreed in writing, with M., who resided in Surrey, to barge timber from Swindon wharf to London, at any wharf there, at 16s. per ton, to include all charges except wharfage. It was necessary to haul the timber from the place where it lay, to be loaded on board the barge, and at times, when the horses of M. were not on the spot, the carrier provided horses and hauled the timber. A plaint was afterward sbrought in the County Court for the district of Swindon against M. for 50l., the balance of account claimed by the carrier, including two items amounting to 1l. 16s. for hauling: Held, that the hauling of the timber and the carriage of it to London constituted but one cause of action, and that, as such cause of action did not arise until the delivery of the timber in London, the judge of the Swindon County Court had no jurisdiction to try the plaint under the 9 & 10 Vict. c. 95, s. 60. *Barnes v. Marshall*, 21 Law J. (N. S.) Q. B. 388.

3. *Same—Right of action—Statute.*—By a local Act passed before the County Courts Act, rates for cleansing and sewerage of the town of Birkenhead may be recovered by action "in any of her Majesty's courts of record at Westminster." By the County Courts Act (9 & 10 Vict. c. 95, s. 58), all pleas of personal actions under 20l. may be holden in the County Court: Held, that the County Court had jurisdiction to hear a plaint brought to recover a sum under 20l. due in respect of a rate under the local Act. *Stewart v. Jones*, 22 Law J. (N. S.) Q. B. 1.

4. *Same—Title to tolls.*—The title to an incorporeal hereditament is in question when either its existence or the right to it is disputed. The Ramsgate Harbour Act (32 Geo. 3, c. lxxiv.) imposed certain "rates and duties" on the owners of vessels entering or passing the harbour. A vessel having passed the harbour on her outward and also on her homeward voyage, a claim for two payments under that Act was made upon the owner in respect of each voyage. He made both payments under protest, and sued in the County Court for the

money paid in respect of the last voyage, on the ground that the Act did not entitle the trustees to a second payment under these circumstances: Held, that these rates and duties were tolls, and that the title to a toll was in question within the meaning of the 9 & 10 Vict. c. 59, s. 58. *Adey and another v. The Deputy Master of the Trinity House*, 22 Law J. (N. S.) Q. B. 3.

And see FRIENDLY SOCIETIES ACT.

COVENANT.—1. *Construction—Railway company.*—A railway company, who were promoting in Parliament a Bill for an extension of their line, which, if made, would pass through the lands of the plaintiff, covenanted with the plaintiff, that in the event of the proposed Bill passing in the then session of Parliament, the company should, before they should enter upon any part of the plaintiff's lands, pay to him 4,900*l.* purchase-money for any portion, not exceeding forty-three acres, which the company might, under the powers of their Act, require and take for the purposes of their undertaking; and that in addition to the purchase-money as aforesaid, the company should pay to the plaintiff, before they should enter upon any part of his said land, 7,100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect to the lands, not exceeding forty-three acres, to be taken by them: Held, that the company were not liable to pay either of these sums unless they entered upon some part of the plaintiff's lands: Held also, that an absolute covenant to pay these sums to the plaintiff by the company would be *ultra vires* and void. *Gage v. The Newmarket Railway Company*, 21 Law J. (N. S.) Q. B. 398.

2. *Contract of company—Engineer pleading—Readiness and willingness.*—The declaration in covenant set out an indenture between the plaintiffs and the defendants, a railway company, which, after reciting that the defendants were desirous of being supplied with 350,000 sleepers of the description in the specification annexed, and that in the specification was stated the times within which, and the port at which, they were to be delivered, contained a covenant by the plaintiffs that they should and would, within the times and at the place mentioned in the specification, as and when and in such quantities as the company's engineer should from time to time, or at any time within the period limited in the specification, direct and require, furnish the company with 350,000 sleepers. The engineer had power to vary the form of the sleepers, and to settle the amount of difference in the price to be paid to the plaintiffs in consequence of such alteration. It was also stipulated, that if the contractors did not regularly deliver the sleepers, the company might determine the contract by notice. The deed then proceeded: "That the said company will pay to the said contractors for the said sleepers hereinbefore to be supplied, the price of 4*s.* 3*d.* per sleeper, at the time and in the manner hereinafter mentioned." In effect thus; nothing was to be paid until 2,000*l.* worth of sleepers had been delivered and certified, and then only the excess in value above 2,000*l.*; and the 2,000*l.* were to be

paid within two months after the whole of the 350,000 sleepers hereinbefore agreed to be supplied should have been delivered and a certificate given. The declaration then set out the specification, which stated,—“The number of sleepers required under this specification is 350,000; one half of the sleepers will have to be delivered in 1847, and the remainder by midsummer, 1848. The port at which the delivery will have to be made is G.” It then stated that the year 1847, and midsummer, 1848, had elapsed; that the plaintiffs were always ready and willing to deliver the sleepers within the times and at the place specified when and in such quantities as the engineer should require; yet that the engineer did not during 1847 give any order touching the delivery of half the sleepers, or by midsummer, 1848, for the other half. Among other pleas, the defendants pleaded that they had no notice or knowledge that the plaintiffs were ready or willing to supply the defendants with the said half of the sleepers. The issue on this plea was found for the defendants: Held, that this indenture contained a covenant by the railway company that they would take the whole 350,000 sleepers at the stipulated price before midsummer, 1848, and also that their engineer should give the necessary orders for their delivery within the times limited by the specification. Held, further, that the plaintiffs were entitled to judgment, *non obstante veredicto*, on the issue of the plea, that the defendants had no notice of the plaintiffs’ readiness and willingness, as the plaintiffs were not bound to be ready and willing until they had orders from the engineer to deliver any sleepers, and need not have alleged that they were ready and willing; and that, consequently, notice to the defendants that they were ready and willing was not necessary. *Great Northern Railway Company v. Harrison and others*, 22 Law J. (N. S.) C. B. 40.

And see ACTION, 8.

DEBT.—*Payment by stranger—Bill of exchange—Pleading.*—To an action of debt on simple contract the defendant pleaded, that after the accruing of the debts and causes of action, and before suit, the plaintiff drew a bill on one A. B., who accepted the bill and delivered it to the plaintiff for and on account of the said debts and causes of action, and that the plaintiff received it from A. B. on such account; that the plaintiff before suit indorsed the bill to C. D., who was still the holder, and entitled to sue A. B. thereon: Held, a good answer to the action. *Belshaw v. Burt*, 22 Law J. (N. S.) C. B. 24.

DEL CREDERE. See SHIP, 3.

DILAPIDATIONS. See CHURCH.

DRAINAGE ACT.—*Commissioners—Appointment—Notice requiring lands—Warrant and inquisition—Jurisdiction.*—By an Act for the drainage of certain lands in Lincolnshire, it was provided that the lords or ladies of three manors for the time being, or in their absence their respective agents, appointed in writing, should be commissioners for executing the Act; that no person should act as a

commissioner or agent of a commissioner until he had made and subscribed a declaration in the form given by the Act; that if the commissioners required certain lands for the purposes of the Act, they were to give a notice of their intention to the landowner, stating the particulars of the land required; and if the amount of compensation were disputed, the commissioners were to issue their warrant to the sheriff to summon a jury to assess compensation, and the sheriff was to give judgment for the sum so assessed. The three lords of the manors never made or subscribed the declaration, and a few days after the statute passed (being all then in England, but absent from Lincolnshire), they, by separate instruments, in the form of appointment given by the Act, appointed the three defendants their respective agents. The defendants made and subscribed the declaration before they did any act as commissioners: Held, that the defendants being agents appointed by the lords, were themselves commissioners; that in appointing the defendants the lords did not act as commissioners, and therefore it was unnecessary for them to make the declaration; that when the commissioners required lands under the Act, and had given the landowner due notice that his lands were required, and had stated in it the particulars of the lands, it was necessary that either the warrant issued to the sheriff to summon a jury to assess compensation, or the inquisition assessing it, should refer to the notice, or state particulars of the land, in order to give the sheriff and jury jurisdiction to inquire into the question of compensation. *Ostler v. Cooke and others*, 22 Law J. (N. S.) Q. B. 71.

EJECTMENT. See **AMENDMENT.**

ESTOPPEL.—*Fraud on third parties*—*Public commissioners*—*Power to borrow money.*—The Westminster Improvement Commissioners were authorized by several Acts of Parliament to borrow such sums as they should think necessary for the purposes of the Act, and to give bonds for the same, and which bonds were assignable. In an action by the plaintiff as transferee of one of such bonds, the condition of which recited that the defendants had, in pursuance of the said Acts, borrowed of one T. P. 5,000*l.* for enabling them to carry the said Acts into execution, the defendants pleaded that they did not borrow the said sum of T. P., or any part thereof, for the purposes of the said Acts, and that they were not authorized to make the said bond, and that the same was made contrary to the provisions of the said Acts, of which the said T. P. and the plaintiff had notice at the time the bond was made and transferred to the plaintiff: Held, upon general demurrer, that the plea was bad. The defendants also pleaded that at and before the bond was made, certain persons, namely C. M. and W. M., were entitled to receive from the defendants certain bonds; that the said T. P. and others conspired fraudulently to procure for T. P. one of the said bonds, to which the said C. M. and W. M. were entitled; and that by means of such conspiracy and fraud they procured the said C. M. and W. M. to authorize the

defendants to give to the said T. P. one of the said bonds they were so entitled to; and that the bond sued upon was thereupon given to T. P. by the defendants; and that they, the defendants, had never borrowed any sum of money from the said T. P.; of all which premises the plaintiff, at the time of the transfer to him of the said bond, had notice: Held bad on general demurrer, because the defendants could not set up as a defence the fraud that had been committed upon C. M. and W. M., by whose directions they had, in pursuance of their contract with them, given the bond to T. P. *Horton v. Westminster Improvement Commissioners*, 21 Law J. (N. S.) Exch. 297.

EVIDENCE.—*Contradiction of witness—Collateral issue.*—The defendant being sued as executor of A., in respect of a promissory note purporting to be signed by A. and B., but alleged by the defendant to be forged, stated, in cross-examination, that he had not heard B. admit having signed the note: Held, that the plaintiff was not at liberty to contradict the defendant by showing that the latter had heard B. make the admission. *Palmer v. Trower, executor of Trower*, 22 Law J. (N. S.) Exch. 32.

FALSE IMPRISONMENT.—*Trespass or case.*—Trespass for false imprisonment. The defendant Barnes having obtained a warrant to search the plaintiff's house, and to apprehend him on a charge of felony, the warrant being headed "To the constable of D., in the county of W.," delivered it to the defendant Barton, a county constable, appointed under 2 & 3 Vict. c. 93, who executed it within the parish of D. by apprehending the plaintiff. The action was not brought until the expiration of six months from the time of act committed: Held, first, that trespass was the proper form of action; secondly, that the parish constable of D., and not the defendant Barton, was the proper party to execute the warrant; but that Barton was protected, the action not having been brought against him within six months, pursuant to the 24 Geo. 2, c. 44, s. 8; and that the other was liable. *Freegard v. Barnes and Barton*, 21 Law J. (N. S.) Exch. 320.

FRAUDS, STATUTE OF.—*Parol contract made abroad.*—The 4th section of the Statute of Frauds does not make the agreements therein mentioned void, but only prevents them being enforced by action, if the requirements of that section are not complied with. Therefore an action cannot be maintained in this country upon a parol agreement which is not to be performed within a year, although made in France, and valid and enforceable there. *Leroux v. Brown*, 22 Law J. (N. S.) C. B. 1.

FREEHOLD. See PARLIAMENT.

FRIENDLY SOCIETIES ACT.—*County Court—Jurisdiction—Arbitration.*—By the 32nd rule of a friendly society, established in 1836, it was provided, that if any dispute should arise between any officers of the society, or between any other members and any

officer, it should first be referred to the committee, and if their decision should not be satisfactory, then to arbitrators, pursuant to the 10 Geo. 4, c. 56, s. 27. In 1839, a reserved fund, consisting of subscriptions, was established, and was regulated by a new rule, called the 38th rule, which provided that every dispute should be referred to arbitration in the manner provided by the rule of the society. In 1850 this rule was expunged. The Friendly Societies Act, 13 & 14 Vict. c. 115, s. 22, enacts, that if any dispute shall arise between the members or person claiming under or on account of any member of any society established under this Act and the trustees, &c. or committee, it shall be settled as the rules of the society shall direct; but if the dispute be such that for the settlement of it recourse must be had to a court of equity, it may be referred to the judge of the County Court. An action having been brought in the County Court by the committee of the society against the trustees to recover the amount of the reserved fund: Held, that this was a dispute provided for by the 27th section of the 13 & 14 Vict. c. 115, and that it might be referred to arbitration under the 32nd rule of the society; that it was not a dispute requiring to be settled by a Court. The Court, therefore, had no jurisdiction, and a writ of prohibition ought to be awarded. *Grinham and another v. Card and another*, 21 Law J. (N. S.) Exch. 320.

GAOL.—*Houses within precincts—Exemption from rates.*—Three houses, situated beyond the actual wall of a county gaol, but within its precincts, were appropriated to the occupation of the governor and of two of the warders of the gaol, respectively, and they inhabited these houses solely as officers of the gaol. The house of the governor had an internal communication with the gaol, but the other houses had no communication with it, except by means of the principal entrance of the gaol: Held, that the occupier of each of these houses was exempt from liability to be assessed to the poor-rate, on the ground that the houses were virtually part and parcel of the gaol. On the hearing of a special case in an appeal stated for the opinion of one of the superior courts, under the 12 & 13 Vict. c. 45, s. 11, the counsel for the party in support of the rate is entitled to begin. Upon such hearing, the Court refused to hear more than one counsel upon either side. *Justices of Bedfordshire v. Churchwardens and Overseers of St. Paul, Bedford*, 7 Exch. 650.

HIGHWAY.—*Thoroughfare—Right to remove obstruction.*—A public highway may in point of law exist over a place which is not a thoroughfare. To a declaration in trespass for entering the plaintiff's close and pulling down a wall there, the defendant pleaded that the close in question was a paved public place within the meaning of the Metropolitan Paving Act (57 Geo. 3, c. 29), and that the plaintiff had unlawfully, and contrary to the provisions of the said Act, erected thereon the said wall; and because the said wall at the said time when, &c. remained incumbering the said public pavement, and because the plaintiff upon the request of the defendant refused to

remove the same, the defendant entered upon the said close and pulled down the said wall: Held (after verdict for the defendant), that the plea was bad, as it did not show any necessity for the defendant's using the portion of the pavement obstructed by the wall, or that it interfered with his right of passage. *Bateman v. Bluck*, 21 Law J. (N. S.) Q. B. 406.

HIGHWAY RATES.—*Borough of Ashton-under-Lyne.*—Where the plaintiff was by deed appointed to the offices of auditor and superintending manager of the defendant's estates, at a salary of 1,800*l.*, payable half-yearly on the 7th of July and the 7th of January in every year, and the defendant had revoked the appointment in the middle of a current year: Held, that the 4 & 5 Wm. 4, c. 22, s. 2, did not enable the plaintiff to recover a proportionate part of the salary in respect of that portion of the year during which the plaintiff held the offices. That statute applies to cases where payment for the whole period must be made to some person, and does not include a payment under a contract between employer and employed for services performed where the payment entirely ceases upon the determination of the claimant's right to receive it. The defendant by deed appointed the plaintiff auditor of his estates, at a yearly salary, and in consideration thereof, the plaintiff covenanted to give up his practice as a barrister, if required so to do, and not to accept any other office or employment whatever so long as he should hold the said office. The defendant also covenanted to pay the plaintiff the said salary during so long as he should hold the office; and in case the defendant should revoke the appointment without adequate and just cause (to be determined as hereinafter mentioned), that the defendant should pay him a retiring pension of 1,000*l.* a year; and it was provided, that the adequacy and justice of the cause of any revocation by the defendant of the said appointment should be determined by J. W.: Held, that the defendant had no power of dismissing the plaintiff without giving him a right to the pension of 1,000*l.* a year, until he, the defendant, had previously ascertained by a reference to J. W. that he had adequate and just cause to revoke the appointment: Held also, that the jurisdiction of the Court to enforce pension was not ousted, and that the plaintiff might declare for it without showing that there had been any determination by J. W., or any excuse for his not having obtained such determination, or that a reasonable time for obtaining such determination had elapsed. *Reg. on the prosecution of The Mayor, &c. of Ashton-under-Lyne v. Slater*, 21 Law J. (N. S.) Q. B. 370.

IMMEMORIAL RIGHT. See **RIGHT OF COMMON.**

INDORSEE. See **BILL OF EXCHANGE**, 1.

INFRINGEMENT. See **INSPECTION OF MACHINERY.**

INLAND NAVIGATION.—*Tolls—Demise—Non-payment of rent.*—Debt upon an indenture, dated the 27th of December, 1849, alleged to have been made between five commissioners of an inland

navigation, under the authority of several Acts of Parliament, on the one part, and the defendant on the other part, whereby the commissioners, as was alleged in the declaration, in consideration of the rent therein mentioned, demised the tolls of the said navigation to the defendant for one year, from the 1st of January, 1850, at the rent of 3,470*l.*, payable monthly, together with certain other payments; and the defendant covenanted with the commissioners, parties to the said indenture, and also with the whole body of the commissioners of the navigation as a separate covenant, for the due payment of the rent. The declaration then avowed an entry by virtue of the demise, and the occupying and receiving the tolls during the entire year. Breach, the non-payment of the rent. Plea, that the commissioners, the lessors named in the indenture, never executed the lease, and that the entry and occupation was at the will of the commissioners only, and not under the demise. Replication, that the defendants had entered, and had received and enjoyed the tolls, &c., by the permission of the commissioners, under the terms of the indenture: Held, that as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated, namely, a permanent estate during the demise and under its terms, and therefore, that he was not liable to be sued upon his covenant in that instrument. *Swatman v. Ambler*, 8 Exch. 72.

INSOLVENT.—1. *Conveyance — Petition — Protection from process.*—A tenant being indebted to his landlord for rent, and being in insolvent circumstances, proposed to and executed to the defendant in April 1850, a bill of sale of his farming stock and furniture, and in June 1851 petitioned the Insolvent Court for protection from process. The 7 & 8 Vict. c. 96, s. 19, after making void certain voluntary conveyances by parties in insolvent circumstances, provides that no such conveyance should be deemed void if made prior to three months before filing the petition, and not with the view or intention by the party so conveying of petitioning the Court for protection from process. The judge directed the jury to consider whether the insolvent executed the bill of sale with the view or intention of petitioning the Insolvent Court for protection at any time when he might apprehend proceedings would be or were taken against him: Held, that this was a misdirection, the question being not whether the insolvent had a general intention at some future time of petitioning the Insolvent Court, but whether he had the present intention of so doing. *Thoyts and another, assignees of Goddard, v. Hobbs*, 21 Law J. (N. S.) Exch. 340.

2. *Discharge without adjudication—Vesting order.*—Where an insolvent, who has petitioned for his discharge under the 1 & 2 Vict. c. 110, is discharged out of custody by the default or consent of his detaining creditor without any adjudication being made: Held, by Lord Campbell, C. J., and Coleridge J. (affirming *Grange v. Trickett*), (1) that upon such discharge the vesting order becomes void, and that the property which had passed to the assignees under it reverts

in the insolvent: Held, by Erle J., that the vesting order continues in force, notwithstanding such discharge, until made null by the Insolvent Court. Section 44 of the 1 & 2 Vict. c. 110, provides, that in case any prisoner as to whose estate and effects any vesting order shall have been made, shall, by the consent or default of his detaining creditor, be discharged out of custody without any adjudication being made, in such case no action shall be commenced against the provisional assignee, nor against any person duly acting under his authority, except to recover any property, &c. of such prisoner detained after an order made by the Insolvent Court for the delivery thereof, and demand made thereupon. To an action of detinue, the plea stated proceedings in the Insolvent Court, and the making of a vesting order whereby the goods of the plaintiff in the declaration mentioned became vested in S. S., the provisional assignee, and alleged that the defendant, as the servant and by the authority of the said S. S., so being such provisional assignee, after the making of the said vesting order, detained the said goods in the declaration mentioned. The replication alleged that before the defendant detained the said goods, the plaintiff was discharged out of custody by the default of his detaining creditor without any adjudication being made by the Court, and that the defendant did not detain the said goods by virtue of any order, authority, or command of the said S. S. made or given to the defendant before the plaintiff was so discharged as aforesaid. On special demurrer to the replication: Held, that it admitted that the goods were detained by the defendant under the authority of S. S., given after the plaintiff's discharge, but before any order of the Insolvent Court for the delivery of the goods, and that, even supposing, on the discharge without adjudication, the property reverted in the insolvent, the plea was an answer to the action: Held also, that the allegation in the plea, that the defendant detained by the authority of the provisional assignee, was not premature, and might have been traversed by the replication. *Kernot v. Pittis*, 21 Law J. (N. S.) Q. B. 413.

3. *Rehearing of petition—Jurisdiction.*—The Court for the Relief of Insolvent Debtors had no jurisdiction to rehear the case of an insolvent who has been discharged by the judge of a County Court, under the 10 & 11 Vict. c. 102, s. 2: *Semble*, that the judge of a County Court has power to rehear the case. *Ex parte Phillips and another, re Clabburn*, 21 Law J. (N. S.) Q. B. 379.

4. *Right to sue after vesting order.*—An insolvent who has petitioned the Insolvent Court for his discharge, under 1 & 2 Vict. c. 110, may sue for a debt which accrues due to him after the vesting order, and before his final discharge, unless the provisional assignee interferes. *Jackson v. Bernham and Uxor, administratrix of B. Beaumont*, 22 Law J. (N. S.) Exch. 13.

INSPECTION OF MACHINERY.—*New Patent Act—Infringement.*—An application to inspect the defendant's machinery may be made by the plaintiff under the New Patent Act, 15 & 16

Vict. c. 83, s. 42, before the delivery of the declaration in an action for infringement of the plaintiff's patent; but such inspection will not be granted as of course, or without the party applying for it showing that the inspection is material for the purposes of the cause. *Amies and another v. Kelsey*, 22 Law J. (N. S.) Q. B. 84.

INSURANCE COMPANY.—*Losses to customers—Draft for payment—Forged endorsement.*—An insurance company were in the practice of paying losses due to country customers by accepting drafts on the company in London, drawn by their country agent to the order of the customer. The drafts were not drawn till the company in London gave the agent leave to draw, nor accepted till they bore the endorsement of the payees; and were found, on examination, to correspond with the leave to draw. When accepted, they were made payable at the bank of R., the London banker of the company. R. was not informed of this practice. A loss of 5,000*l.* became due to J. at Manchester. The agent of the company at Manchester, in pursuance of their leave, drew on the company a draft for 5,000*l.* payable to the order of J., and delivered it to J.'s solicitor. This draft, purporting to be endorsed by J. to the order of J. and L., London bankers, was by J. and L. presented for payment to the company and accepted, payable at R.'s bank on maturity; it was there paid to J. and L. This payment was debited to the company in the pass-book delivered to them: they credited R. with the payment. No objection was made till, six months afterwards, it was discovered that the endorsement purporting to be that of J. was a forgery by the solicitor, and the company were compelled to pay J. The company brought *assumpsit* against R. First count, that defendant as banker (amongst other things) promised plaintiffs, while he should have funds of the plaintiffs, to pay to the lawful holders thereof all such bills of exchange as should be accepted by plaintiffs payable at defendant's, and not to pay any such bills to any person not the lawful holder thereof; and to debit plaintiffs in account only with such bills, so accepted, as should be paid to the lawful holders thereof. Breaches of these promises were alleged. Second count, for money lent. Pleas (amongst others), *non assumpsit*; and to the second count, payment and set-off. At the trial, the above facts being admitted, the judge directed the jury to find a verdict for the plaintiffs, with nominal damages on the first count, and 5,000*l.* on the second. On bill of exceptions to the ruling: Held, by the Court of Exchequer Chamber, on error, that the acceptance of a bill of exchange, payable at a banker's, is tantamount to an order to the banker to pay the bill to any person who, according to the law merchant, can give a valid discharge for it, and not merely to the lawful holder; and that the banker may debit his customer with such payment; and that the first count misstated the undertaking of bankers, and was not proved, and that the judge's direction was so far wrong; but held, that a banker cannot debit his customer with the payment made to one who claims through a forged endorsement,

and so cannot give a valid discharge for the bill, unless there be circumstances amounting to a direction from the customer to the banker to pay the bill without reference to the genuineness of the endorsement, or equivalent to an admission of its genuineness, inducing the banker to alter his position, so as to preclude the customer from showing it to be forged. That the facts in this case afforded no evidence to go to the jury of such a direction, or of such an inducement; and consequently that the judge's direction in plaintiff's favour on the second count was right. *Roberts v. Tucker*, 18 Q. B. 560.

JOINT-STOCK COMPANY.—1. *Action by scrip-holder.*—The deed of settlement of a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, was executed by one-fourth of the shareholders, and contained a clause providing that the shares of every subscriber who should not execute the deed within three months from its date should be forfeited, if the board of directors thought fit; and that the amount paid upon such shares should become the property of the company. Under this clause, the shares of a scrip-holder in the company, who had not applied to sign the deed within three months from its date, were declared forfeited, without any reasonable notice having been given; and a subsequent application to be allowed to sign was refused: Held (in an action for such refusal, and for not causing a certificate of proprietorship of the shares to be delivered to the plaintiff), that the clause of forfeiture could not be objected to as being *ultra vires*, or unreasonable; and that as the deed did not require notice to be given before forfeiture, no such notice was necessary; and therefore, that after the forfeiture, the plaintiff's title to the shares ceased. *Stewart v. Anglo-Californian Gold-mining Company*, 21 Law J. (N. S.) Q. B. 393.

2. *Shareholders—Deposit—Deed of settlement—Non-execution.*—The defendant applied for and obtained shares in a projected company, the capital of which was to consist of 500,000*l.* in 50,000 shares, and pay the deposits thereon. The company was completely registered under 7 & 8 Vict. c. 110, and the defendant's name was entered as a shareholder in the register of shareholders and in the schedule to the deed of settlement; but he never executed the deed of settlement, or any deed referring to it. The full amount of capital never was subscribed; but the company began business with less, but not succeeding, a private Act of Parliament was passed for the purpose of winding up the concern. This Act recited the deed of settlement, and the facts as to the deficiency in the subscribed capital, and authorized the directors to make calls upon the shareholders, and bring actions to recover such calls; and enacted that in such actions it should be sufficient to prove that the defendant was a holder of shares at the time of the call, and that the production of the register of the shareholders of the company should be *prima facie* evidence of the number of shares held by him. It also enacted that, except as otherwise provided by the Act, every such call should be made according to the deed of settlement; and as regarded the

liabilities of the shareholders, the forfeiture of shares and otherwise should be deemed to have been made under such provisions; and also that nothing in the Act contained, except as therein expressly enacted, should render any shareholder or other person liable to the company, if such shareholder or other person would not have been liable thereto if the Act had not passed: Held (in an action for a call under the private Act), that the defendant was not liable as a shareholder or otherwise, as he had not executed the deed of settlement or any deed referring thereto; and the private Act only extended to such shareholders: Held also, that even had the private Act extended to persons who had agreed to take shares, he would not have been liable, as the acceptance of the shares was conditional upon the full capital being subscribed; and this condition had not been performed or waived. *Galvanized Iron Company v. Westoby*, 21 Law J. (N. S.) Exch. 302.

JUDGMENT.—*Order of judgment charging shares—Shares—Equity.*—The defendant being the registered owner of 200 shares of a joint-stock company, deposited the certificate thereof with E., as a security for money advanced. He afterwards borrowed a further sum from an insurance-office, of which C. was a director, and E. and C. being sureties for the repayment of that sum, he executed, according to the Joint-Stock Act, a transfer to C. of the shares, accompanied by a declaration of the terms of the transfer, and delivered both instruments to C. Judgment for the recovery of the sum advanced having been obtained by the insurance-office, and a judge's order *nisi* to charge the shares having been made, C. subsequently requested the joint-stock company to transfer the shares in his name, which they refused, and the shares remained standing in the name of the defendant. The Court made the judge's order absolute, holding that the shares were to be considered as standing in the defendant's name in his own right, within the meaning of the 1 & 2 Vict. c. 110, s. 14, and that the relief of the creditors was in equity. *Fuller and others v. Earle*, 21 Law J. (N. S.) Exch. 814.

JURISDICTION. See COUNTY COURT, 1, 2, 3, and 4.

LEASE—Construction of—Rent-charge—Livery of seisin.—M. H. and W. R., by indenture of February, 1805, granted and leased certain premises unto and to the use of J. H., his heirs, executors, administrators, and assigns for ever, yielding and paying therefore a yearly rent. Proviso for re-entry on nonpayment of rent; covenant by J. H. for payment of the rent, for repairs, and for insurance: Held, that in the absence of proof that the premises were, at the date of the instrument, in the occupation of tenants, and the expressed intention of the parties precluding the presumption of livery of seisin, the instrument could not operate as a conveyance of the fee, subject to a rent-charge, but only to create a tenancy from year to year. *Semble*, that if it had been necessary to presume livery of seisin in order to prove the instrument, the Court would have made that presumption. *Doe d. Robertson v. Gardiner*, 21 Law J. (N. S.) C. B. 222.

And see ACTION, 3.

LEGACY.—*Chose in action*—*Right of suing*.—The Wills Act (1 Vict. c. 26) does not enable a testator to bequeath a chose in action so as to pass the right of suing to the legatee. Where a party, who is afterwards convicted of felony, is entitled to a chose in action, the right of suing being in another in trust for him, that right of suit does not vest in the Crown upon the conviction. To an action by the executor of E. C., deceased, on a promissory note, made by the defendant, payable to E. C. on demand, the defendant pleaded that E. C., by his will (made after the passing of the 1 Vict. c. 26), bequeathed the note to C. C., that the plaintiff assented to the bequest, whereby C. C. became entitled to the said note, and the money due thereon, and that whilst the said C. C. was so entitled, he was convicted of felony; by reason thereof he forfeited to the Crown the said note and all interest therein, and causes of action in respect thereof: Held, on general demurrer, that the plea was no answer to the action. *Bishop v. Curtis*, 21 Law J. (N. S.) Q. B. 391.

LIGHT AND AIR. See **TRESPASS**.

MANDAMUS. See **COPYHOLD**.

MASTER AND SERVANT.—*Domestic servant*—*Governess*—*Month's warning*.—A governess is not within the rule applicable to menial or domestic servants, that, upon a general hiring, the service may be determined by a month's notice, or payment of a month's wages. *Todd v. Kellage*, 22 Law J. (N. S.) Exch. 1.

MONEY LENT.—*Money had and received*—*Deposit of worthless security*.—M. W. deposited certain country bank notes, payable in London, representing 80*l.* in value, with a banking company, and received the following memorandum signed by the manager: "Received of M. W. 80*l.*, for which we are accountable; 80*l.* at 3*l.* per cent. interest, with fourteen days' notice." The notes were sent on the same evening by post to the London agents of the banking company, and were presented on the next day, and refused payment. They were retransmitted by that night's post to the banking company, who, on the following day, gave notice of dishonour to M. W., and tendered to him the notes, which he refused. It turned out that the bank which had issued the notes, had stopped payment upon the day when M. W. made the deposit with the banking company, but that neither M. W. nor the banking company were then aware of this: Held, that under the above circumstances, M. W. could not maintain an action, either for money lent, or for money had and received, against the banking company. *Timmis and Uxor v. Gibbins*, 21 Law J. (N. S.) Q. B. 408.

MORTGAGE. See **STAMP**, 3.

MORTMAIN.—*Shares in a bank*.—A bequest of the proceeds of shares in a joint-stock banking company, formed under a deed of settlement, and which possessed freehold and copyhold property, does not come within the Statute of Mortmain, 4 Geo. 2, c. 36. *Myers v. Perigal*, 21 Law J. (N. S.) C. B. 217.

MUNICIPAL CORPORATION ACT.—1. *Notice of objection*—*Description of party objected to.*—The following notice of objection, duly signed, “To W. B.—I hereby give you notice that I object to your name being retained on the burgess-list of the borough of H.,” was personally served on W. B., a person whose name was on the burgess-list of the borough of H. The notice of objection did not describe W. B. as he was described in the burgess-list, or in any way whatever: Held, that this was not a sufficient notice of objection under the statute 5 & 6 Wm. 4, c. 76, s. 17. *The Mayor and Assessors of Harwich, re Butcher*, 22 Law J. (N. S.) Q. B. 81.

2. *Voting-paper*—*Signature by initials.*—Where at an election of councillors for a borough the voting-paper is signed with the surname and the initial of the burgess voting, it is a sufficient compliance with section 32 of the 5 & 6 Wm. 4, c. 76. The voting-paper described the property in respect of which a burgess voted as “Pilton-street,” or was described in the burgess-roll as of Pilton, and his qualifying property, “House in the street.” It appeared in evidence that Pilton consisted of only one main street, which was called “Pilton-street” or “the Street” indiscriminately: Held, that the voting-paper was sufficient. *Reg. v. Avery*, 21 Law J. (N. S.) Q. B. 428.

NAVIGATION ACT.—*Power to raise weirs*—*Damage to mill-owner.*—The 1 Geo. 1, c. 24, by section 1, empowered certain persons to make the river Kennet navigable, and to dig and cut through the banks of the said river, and to erect in the said river and upon the lands adjoining weirs, pens, dams, &c., and to do all matters and things necessary for making, maintaining, or improving the said navigation, the said undertakers first giving satisfaction to the owners of such lands, weirs, &c., as should be digged, cut, or removed, or otherwise made use of as the commissioners named for the purpose should direct, in case the undertakers should not beforehand have agreed with the proprietors of such lands and hereditaments concerning the same. By section 2, commissioners were appointed to mediate between the undertakers and the owners of lands and hereditaments intended to be made use of, and to settle satisfaction for such portion of the lands as should be cut, digged, or made use of, and a provision was made for filling up vacancies in the body of the commissioners. By section 18, if any person should sustain damage in his mills by the owners of the navigation taking away or diverting the water, or any similar injury, the commissioners should, by a jury empanelled as therein directed, assess such damage, and award compensation to the party injured. The proprietors of the navigation obstructed the water flowing off the defendant’s mill by the erection of a dam under the powers of the above Act. All the commissioners appointed under the above Act had died, and there were no commissioners in existence by whom compensation could be assessed: Held, under these circumstances, by Wightman, J., Erle, J., and Crompton, J., that the powers of the proprietors to raise weirs for the necessary

purposes of the navigation did not cease by reason of the right of the mill-owner to recover compensation for consequential damages through the commissioners being lost. Held, by Lord Campbell, C. J., that the power to raise the weir and cut off the water flowing to the defendant's mill could only be exercised during the continuance of the body of commissioners, and that upon their extinction the extraordinary powers of the proprietors ceased. *Quære*, whether any mode of recovering compensation by action or otherwise existed. *Proprietors of Kennet and Avon Canal v. Witherington*, 21 Law J. (N. S.) Q. B. 419.

NON-USER. See PRESCRIPTION.

NOTICE OF TRIAL. See REPLEVIN.

PARLIAMENT.—1. *Borough franchise—Meaning of word "therewith"*—2 Wm. 4, c. 45, s. 27.—The appellant claimed to vote in respect of the occupation of premises described as "a house and garden," and held under the same landlord at one entire rent. The house alone would not let for 10*l.*, and the garden was separated from it by waste land and a row of buildings: Held, that the word "therewith" in the 27th section of the Reform Act had reference to time, and not to locality, and that therefore the circumstances of the garden between, separate from the house, did not invalidate the qualification, as the house alone would not have let for 10*l.* *Collins, appellant; Thomas, town-clerk of Tewkesbury, respondent*, 22 Law J. (N. S.) C. B. 38.

2. *Borough vote—Assessed taxes, when payable.*—By 11 & 12 Vict. c. 90, no person is entitled to be registered as a voter unless, on or before the 20th of July, he shall have paid all assessed taxes which have become payable by him previous to the 5th of January preceding. By the 43 Geo. 3, c. 161, s. 23, the assessed taxes are payable and are to be paid quarterly, on the 20th of July, the 20th of September, the 20th of December, and the 20th of March. By the 48 Geo. 3, c. 141, s. 1, the collectors are directed to collect the assessed taxes in equal moieties within twenty-one days after the 10th of October and the 5th of April, but with a proviso, that nothing therein contained shall be construed to alter the time when the duties are made payable by the previous Acts. The quarter's house-tax due from the appellant on the 20th of December was not demanded till the 11th of April following, and he did not pay it before the 20th of July: Held, that the quarter's assessed taxes, which by the 43 Geo. 3, c. 161, s. 23, become payable on the 20th of December, are taxes which, in the language of the 11 & 12 Vict. c. 90, have become payable before the succeeding 5th of January, although no demand for payment has been previously made; and that therefore the appellant was not entitled to be placed on the register. *Ford, appellant; Smedley, respondent*, 22 Law J. (N. S.) C. B. 35.

3. *County vote—Form of notice of objection.*—The 7th section of 6 Vict. c. 18, requires that a notice in the form set out in the schedule (A) annexed thereto, or to the like effect, should be served upon the

person whose vote is intended to be objected to: Held, that a notice in the following terms,—“Take notice, that I object to your name being retained in the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts,” was sufficient notice to a person that his vote for the county would be objected to. *Lambert, appellant; Overseer of St. Thomas, New Sarum, respondent*, 22 Law J. (N. S.) C. B. 81.

4. *Same—Forty-shilling freehold.*—The appellant claimed, with twenty-nine other persons, to vote in respect of certain freehold premises, which were let at a gross rent. During the six preceding years, the landlords had voluntarily paid for repairs: Held, that the question whether the annual value of the freehold was reduced by such payments below 60*l.* depended upon the rent which could be obtained if the tenant had to keep the premises in repair, and that the revising barrister having found that the rent which could be obtained in that case would be less than 60*l.*, the several persons in whom the freehold was vested were not entitled to vote. *Hamilton, appellant; Bass, respondent*, 22 Law J. (N. S.) C. B. 29.

5. *Same—Freehold—Value—Rent-charge apportionment.*—The owners in fee of a plot of land, subject to a rent-charge, granted a portion of it to ten as tenants in common in fee, subject to payment of 4*l.* 5*s.* as a proportion of the charge. The grantors covenanted to pay and to keep the grantees indemnified as to the remainder of the charge, and that the grantees, if called upon to pay, should have power to distrain on the residue of the land, which was sufficient to meet that remainder: Held, that although each portion of the land was liable for the whole amount of the rent-charge, yet, as the grantees could enforce contribution against the grantors for all beyond 4*l.* 5*s.*, that amount only was to be deducted in estimating the grantees' interest with reference to the franchise. *Barrow, appellant; Buckmaster, respondent*, 22 Law J. (N. S.) C. B. 85.

6. *Same—Freehold allottee of land—Uncertain interest—8 & 9 Vict. c. 6.*—The 8 & 9 Vict. c. 6, an Allotment Act, empowers deputies appointed under its provisions to make small allotments of land to resident freemen of L., to be held by them so long as they shall be willing to hold the same, and pay the rent, and conform to certain regulations. All the land is vested in the deputies as trustees, and they have the power to sell, with the concurrence of a majority of a meeting of freemen occupiers: Held, that the allottees have freehold estates which entitle them to vote for members of Parliament, as their estate may continue for life, and is not determinable on the mere will of the grantors. *Beeson, appellant; Burton, respondent*, 22 Law J. (N. S.) C. B. 33.

7. *List of voters—Objector's description—Freemen.*—The respondent claiming a vote for the city of C. received a notice of objection from the appellant, who described himself therein as “on the list of freemen for the city of C.” It appeared that, besides the list of freemen for the city entitled to vote for members of Parliament, there was a list called the Freemen's Roll, kept for

municipal purposes: Held, that the revising barrister was right in deciding that the notice was sufficient under the 17th section of the 6 & 7 Vict. c. 18, as affirming that the objector was on the list of freemen entitled to vote. *Dissentiente Maule, J. Feddon, appellant; Sawyers, respondent*, 22 Law J. (N. S.) C. B. 15.

8. *Vote—Freehold—Value—Mortgage.*—Where a person claimed a vote in respect of a freehold, which was of the annual value of 5*l.*, but it appeared that the land, with other land of the claimant of the yearly value of 50*l.*, was mortgaged for 300*l.*, and that the interest payable on the mortgage was 15*l.* a year: Held, that the interest might be apportioned, and that the claimant was entitled to his vote. *Moore, appellant; The Overseers of Carisbrook, respondents*, 22 Law J. (N. S.) C. B. 64.

PATENT.—1. *Infringement—Improvement.*—In the specification of his patent for improvements in the manufacture of iron and steel, the plaintiff declared the nature of his invention to be, “the use of carburet of manganese in any process whereby iron is converted into cast steel,” and he specified the manner of his invention to be, by putting portions of blistered steel into a crucible, together with three per cent. weight of carburet of manganese, which latter substance is formed by a combination of oxide of manganese and carbon, under great heat. Previous to the plaintiff’s patent, oxide of manganese had been tried, but unsuccessfully, to be used in the making of cast steel; for when put into the pots with the steel, it combined with the carbon in the substance of the pots, and spoiled them, but neither carburet of manganese nor its component elements together had been used. After the plaintiff had obtained his patent, he made very superior cast steel by the process described, first making the carburet of manganese by subjecting the oxide and carbonaceous matter together to a great heat in a separate crucible, and then putting it into the crucible containing the blistered steel in a state of fusion. The defendant afterwards made cast steel by putting the oxide and the carbonaceous matters and the pieces of blistered steel together at the same time into the same pot, and thus made the same superior cast steel at a less expense, making one pot and one heating serve the whole process. It was shown that the oxide and carbonaceous matter combined and formed carburet of manganese at a lower degree of heat than was requisite to melt the steel, and that the carburet when so formed afterwards combined with the steel. On the question whether the defendant had, by so making cast steel, infringed the plaintiff’s patent: Held, by the majority of the Court, that there was evidence of an infringement, inasmuch as the plaintiff’s patent was not limited to the particular mode of using the carburet described in his specification, and that the defendant, by the process adopted by him, had either used carburet of manganese or a known chemical equivalent for that substance (namely, its elements) in the manufacture of cast steel. But held, by the minority, that there was no infringement, as, though the defendant had used an

equivalent for the carburet (namely, its known component parts), it was not at the time when the patent was granted known to scientific persons that the component parts of the carburet were equivalent to the carburet itself, applied according to the specification for producing the desired result, and they thought that the defendant's process was an improvement on the plaintiff's patent, and not an infringement of it. *Heath v. Unwin*, 22 Law J. (N. S.) C. B. 7.

2. *Inspection of machine*—15 & 16 Vict. c. 83, s. 42.—In an action for the infringement of a patent, the Court will not grant an order under the 15 & 16 Vict. c. 83, s. 42, for an inspection of a machine upon an affidavit, "that the machine used by the defendants is the same for which the plaintiff has obtained a patent." *Shaw v. The Bank of England*, 22 Law J. (N. S.) Exch. 26.

3. *Specification—Description—Sufficiency of new facts*.—A. obtained a patent for "an improved turning-table for railway purposes," and in his specification gave a description of the machinery, of which no part was in fact new except certain suspending-rods. The combination, however, was both new and useful. In the specification the patentee claimed as his invention the "improved turning-table hereinbefore described, such my invention being, to the best of my knowledge and belief, entirely new:" Held, that the specification was insufficient, for not showing what was new and what old. *Holmes v. London and North-Western Railway Company*, 22 Law J. (N. S.) C. B. 57.

PLEADING.—1. *Annuity Bond—Principal and surety—Statute of Limitations*.—Declaration in the common form on an annuity bond, dated the 9th of June, 1828. Pleas, the Statute of Limitations and the bankruptcy of the defendant after the making of the bond, and the accruing of the causes of action in the declaration mentioned, and before the commencement of the action. Replication, joining issue on the latter plea, and as to the former, that the said causes of action did accrue to the plaintiff within twenty years next before the commencement of the action (setting out the bond and condition, and assigning as a breach of the condition the non-payment of 50*l.* for two years and a half of the annuity). The bond was a joint and several bond of the defendant and M., and was conditioned (after reciting that M. had agreed with the plaintiff for the sale of an annuity of 20*l.*, to be paid to the plaintiff, his executors, &c., during the joint and several lives of the plaintiff and his wife, for the sum of 150*l.*, and that the defendant, at the request of M., had assented to join in and execute the bond for securing the due and regular payment of the annuity, and the receipt by M. of the said sum of 150*l.*), for the due payment by M. or the defendant, their or either of their heirs, &c., of the said annuity, by two equal half-yearly payments on the 9th of December and the 9th of June in every year, during the joint and several lives of the plaintiff and his wife, and a proportionate part of the half-yearly payment of such annuity in the event of the death of the survivor between the half-yearly days of payment. On

the trial it was proved that the defendant had become a bankrupt in 1836; that the defendant had down to 1848 paid the half-yearly instalments of the annuity, but on no occasion until after the days of payment stated in the condition, so that there had been breaches of the bond before the defendant's bankruptcy; and it appeared also more than twenty years before the commencement of the action, and that arrears were then due in respect of breaches committed since 1848: Held, that a new cause of action arose with each successive breach of the condition, and that by proof at the trial, of breaches committed within twenty years, the plaintiff was entitled to the verdict upon the issue raised by the plea of the Statute of Limitations. Held also (Wightman, J., dissenting), first, that the defendant's liability, under the above form of bond and condition, was that of a surety for M., the grantor of the annuity, and who was alone to be considered as the principal debtor; that the plaintiff, therefore, could not have proved under the bankruptcy of the defendant in respect of previous breaches and a forfeiture of the bond, and, consequently, that the bankruptcy and certificate of the defendant were no defence to the action. *Amot v. Holden*, 22 Law J. (N. S.) Q. B. 14.

2. *Set-off—Policy of insurance—Assignment of policy.*—Declaration on a policy of insurance on a ship and cargo, alleging an average damage or loss, to wit, to the amount of twenty per cent. on a portion of the cargo insured, and a breach of the policy by reason of non-payment of the defendant's proportion of the said average loss. The defendant pleaded, 4thly, a set-off; 6thly, a plea, alleging that before the commencement of the suit, and after the accruing of the causes of action, the plaintiff became and was adjudged a bankrupt within the meaning of the 12 & 13 Vict. c. 106, stating specially all the bankruptcy proceedings under the Act, and concluding, that the said J. G. and J. W. then and from thenceforth, and after the making of the said promises, and accruing of the causes of action, and before the commencement of the suit, became and were the assignees of the estate and effects of the plaintiff, entitled to claim and demand, and did actually claim and demand to be entitled, in their names, to sue for all causes of action arising upon the said policy in the declaration mentioned: verification. Replication, that long before the plaintiff became bankrupt, the plaintiff sold and delivered the goods in the policy mentioned and insured to T. and R. F., and did then transfer and deliver the policy and all the right and interest of the plaintiff to recover the said loss and damages to the said T. and R. F., and thereby ceased to have or retain any beneficial interest in the said goods, or the said loss or damage to be recovered under the said policy, and that the plaintiff brought and prosecuted the action in his name, for and on behalf, and at the request of, and as trustee for, the said T. and R. F., and not for his own benefit, or on behalf, or for the benefit of, his assignees in bankruptcy: verification. Rejoinder, that after the making of the policy and promise in the declaration mentioned, and after the attaching of the said risk in the policy mentioned, and before the

bankruptcy of the plaintiff, the said risk ended in the United Kingdom, whereby the plaintiff, before his bankruptcy, became and was, under the policy, entitled to a return of the sum of 23s. 9d. per cent., as in the policy mentioned (the policy contained a memorandum to that effect), but which return had not been made or satisfied, and had been in no way assigned or parted with by the plaintiff: verification. Held, upon demurrer to the 4th plea and the rejoinder,—first, that the claim in the declaration was for unliquidated damages, and therefore that a set-off could not properly be pleaded. Secondly, that the replication was a good answer to the 6th plea. Thirdly, that the claim for a return of premium, relied upon in the rejoinder, was a distinct cause of action from that declared upon, and the rejoinder, therefore, no answer to the plaintiff's right to sue. *Castelli v. Boddington*, 22 Law J. (N. S.) Q. B. 5.

And see ACTION, 2.

POLICY OF INSURANCE. See PLEADING.

PRACTICE AT NISI PRIUS.—*Party his own advocate and witness—Power of judge to make rule.*—The 2nd section of the Act to amend the law of evidence, 14 & 15 Vict. c. 99, does not abridge the former right of a party to a suit to act as his own advocate; and a judge at Nisi Prius has no authority to prevent a party to a suit addressing the jury as his own advocate, and afterwards giving evidence as a witness in support of his own case; but such a course of proceeding is most objectionable. *Cobbett v. Hudson*, 22 Law J. (N. S.) Q. B. 11.

PRACTICE.—1. *Process—Common law procedure—Uniformity of process.*—An original writ of summons expired on the 8th of October, before the Common Law Procedure Act came into operation. In order to save the Statute of Limitations, the Court directed an *alias* writ to issue under the Uniformity of Process Act. *Gapp v. Robinson*, 22 Law J. (N. S.) C. B. 5.

2. *Rule to plead several matters—Time to plead.*—An order to plead several matters was obtained after the Rule Office was closed, upon the day that the time for pleading expired. The pleas were delivered the same evening with a copy of the order, and a notice that the rule would be drawn up and served as soon as it could be obtained from the office. At 10 o'clock the following day the plaintiff signed judgment: Held, that the judgment was regular. *Glen v. Lewis*, 22 Law J. (N. S.) Exch. 24.

3. *Substantial justice—Jurisdiction of Court.*—The Court cannot depart from a general rule of practice in order to do substantial justice in a particular case. The Court gives a party leave to enter judgment *nunc pro tunc* after two terms, only when the delay has been the act of the Court itself. Therefore, where the executrix of a plaintiff was unable to get probate of the will, on account of a caveat entered in the Ecclesiastical Court by the defendant for the purpose of delay, this Court, though reluctantly, refused to give leave to enter

judgment *nunc pro tunc* after the expiration of two terms. *Freeman v. Tranch*, 21 Law J. (N. S.) C. B. 214.

PRESCRIPTION.—*Non-user—Intention.*—Whether mere non-user of a right amounts to an abandonment of the right will depend upon the circumstances which caused the non-user. Therefore, where the use of an immemorial right of way to a close was discontinued, because the occupiers had a more convenient access to it over another close in their occupation: Held, that the non-user afforded no evidence of an intention to abandon the right. *Ward v. Ward*, 21 Law J. (N. S.) Exch. 834.

PRESCRIPTION ACT.—*Twenty years' user—Right of way—Computation of time.*—The 8th section of the Prescription Act, 2 & 3 Wm. 4, c. 71, only applies to the computation of the period of forty years' enjoyment, which, under the 2nd section, confers an absolute and indefeasible right to an easement. Where, therefore, a right of way was claimed under the 2nd section of the Act, in respect of twenty years' user as of right, and it appeared that during a portion of that period the service tenement had been under leases for terms of years, and no resistance had been made, either after or during the lease, to the user of the way: Held, that the time during which the service tenement had been on lease was not, under the 8th section, to be excluded in the computation of the period of twenty years. *Palk v. Skinner*, 22 Law J. (N. S.) Q. B. 27.

PRIVILEGE. See **WITNESS**.

PROCEDURE ACT.—*Demurring and pleading.*—Where a party applies for leave to plead by way of traverse and demur to the same pleading under the 15 & 16 Vict. c. 76, s. 80, he ought to swear that the allegations proposed to be traversed are untrue. *Semble*, that in such cases if the facts are within his own personal knowledge, he must swear positively to that effect; if not, then that he is so informed, and believes; and if a third person is vouched, he should show either that he has made inquiry of that person, or that it would be impossible or inconvenient to do so. In an action on a contract the Court allowed the defendant both to plead and demur to the declaration, although the validity of the contract had been affirmed on a motion for an injunction in the Court of Chancery, to which the defendant was a party, and in the decision of which Court he had acquiesced. *Lumley v. Gye*, 22 Law J. (N. S.) Exch. 9.

PROHIBITION.—*Ecclesiastical Court—Practice—Judgment pronounced without previous notice.*—W. S. was in August, 1850, cited to appear in the Consistorial Court to answer his wife in a suit for restitution of conjugal rights. He duly appeared, and was heard on that and on subsequent occasions during the progress of the suit. On the 9th of June, 1852, in his absence, and without previous notice or summons, two monitions were decreed against him: Held, that as he had been duly brought before the Court at the commencement of the suit, the omission to give him notice of the time and

place when the decrees would be pronounced, was matter relating to the practice of the court, and no ground for a prohibition. *Ex parte Story*, 22 Law J. (N. S.) C. B. 75.

PUBLIC BUILDING. See RAIL.

RAILWAY COMPANY.—1. *Application of funds—Illegality—Agreement by stranger that railway company should pay costs of bill in Parliament—Notice of company's powers.*—The chairman of the South-Eastern Railway Company promised the managing committee of a proposed railway company that, in consideration of their not abandoning their project and intention of applying to Parliament for an Act to authorize the making of the proposed line, the South-Eastern Railway Company would, in case of rejection of the scheme, insure the company, of which the plaintiffs were the managing committee, against loss which might be occasioned to such proposed railway company by such rejection and failure, and would defray and pay all expenses incurred by them in endeavouring to obtain the Act. The South-Eastern Railway Company, by their Acts, were authorized to apply their funds for certain purposes only, not including the payment of the costs of the proposed proceeding in Parliament: Held, that the agreement was void, as it was an agreement made by contracting parties (who must be presumed to have full knowledge of the powers conferred on the South-Eastern Railway Company by their Acts of Parliament, which were public Acts) that that company should do an act which was illegal, contrary to public policy and the provisions of the statutes. *Macgregor v. Official Manager of the Deal and Dover Railway Company*, 22 Law J. (N. S.) Q. B. 69.

2. *Conveyance of goods—Condition.*—The plaintiff delivered at Bristol to the defendants (a railway company) certain goods, and took from them a receipt-note, which stated that the goods were received to be conveyed by the company as below, and on the conditions stated on the other side. Then followed a statement that "Bristol" was the station from which, and "Paddington" the station to which, the goods were to be carried, and that the plaintiff's address was at "Brompton." One of the conditions stated, that goods addressed to consignees resident beyond the immediate vicinity of the company's goods station, would be forwarded by public carrier, or otherwise, as opportunity might offer; but that the delivery of the goods by the company would be considered as complete, and the responsibility of the company cease, when such carriers received the goods; and that the company would not be responsible for loss or damage to goods beyond the limits of their railway. The goods in question were safely conveyed by the defendants to their London terminus at Paddington, and there given over to a person specifically appointed by them for the collection and delivery of goods, and through the negligence of his servant were damaged on their delivery at the plaintiff's house at Brompton. The defendants made one entire charge for the carriage from Bristol to Brompton: Held, that the defendants were not liable for the damage; and, conse-

quently, a declaration which stated that they as common carriers received the goods to be carried from Bristol to Brompton could not be supported. *Fowles v. Great Western Railway Company*, 7 Exch. 699.

3. *Mandamus to make line—Lands Clauses' Consolidation Act*, 8 Vict. c. 18, s. 16.—*Extension of existing line—Funds, power of raising—Expiration of powers since return—Peremptory mandamus.*—Section 16 of the Lands Clauses' Consolidation Act (8 Vict. c. 18), which enacts, that the whole of the capital shall be subscribed under a contract, binding the parties thereto for the payment of the sums subscribed, before it shall be lawful to put in force any of the powers of compulsory purchase, does not apply to a case where an extension line of railway is to be made by an existing company, by means of funds to be raised by new shares in such company. Supposing section 16 to apply to such a case, where a *mandamus* ordered the company to make the extension line, a return alleging that the capital required for making it had not been subscribed under any contract as required by that section, and that the line could not be made without exercising the compulsory powers of purchase, is no answer to the writ, as it does not show any inability to obtain such a subscription, or any incapacity to obey the writ. Where the period for exercising the compulsory powers had expired since the return, a peremptory *mandamus* to make the line must nevertheless be awarded. *Reg. on prosecution of Langford v. Great Western Railway Company*, 22 Law J. (N. S.) Q. B. 65.

4. *Mortgagee—Covenant—Right to sue.*—A railway company which, by their Acts of Parliament, were empowered to borrow money on mortgage, borrowed money of H. By the mortgage-deed, which was in the appointed form, the company, in consideration of the sum lent, assigned to H. the undertaking, and all the estate, &c. of the company therein, to hold to H. until the sum, with interest, was satisfied; and added the words: "the principal sum to be paid on the 1st of January, 1851." The company did not pay it when due. By the local Act, applicable to the case, the stat. 7 & 8 Vict. c. 85, it is provided in section 49, that the company may fix the period for the repayment of the principal sum and interest, and in such case they are to cause the period to be inserted in the mortgage-deed; on the expiration of which period it is enacted, that the principal and interest shall be paid to the party entitled to the mortgage. Section 52 states, "that if the principal and interest be not paid within six months after the same has become payable, and after demand thereof in writing, the mortgagee may sue for the same; or if his debt amount to 5,000*l.*, he may alone; and if not of that amount, he may in conjunction with other creditors, whose debts with his amount to 10,000*l.*, require the appointment of a receiver:" Held, first, that the mortgage-deed, on its face, imported a covenant by the company to pay the money. Secondly, that where a corporation is created for certain purposes, with power to sue and be sued, and to borrow money for the completion of those purposes, and to secure

the repayment of such money by an instrument which, on its face, imports a covenant for repayment, if money be so borrowed, and so secured, and not duly repaid, an action may be brought against the company on a breach of the covenant, although there are no specific statutory provisions enabling the company to bind themselves by such a covenant, and giving a right of action against them; consequently, that H. might maintain an action against the company on the mortgage-deed, although he had not made any demand in writing. And further, that section 52 of the local Act, in accordance with section 53 of the Companies Clauses' Consolidation Act, the stat. 8 & 9 Vict. c. 16, did not give a right of action for the principal money, but only recognized it as already existing, and provided, that when there had been a default in payment for six months, and a demand in writing, the lender might either sue or have a receiver appointed. *Eastern Union Railway Company v. Hart*, 22 Law J. (N. S.) Exch. 20.

5. *Obligation to complete line where part made—Statute—Construction—Mandamus—Return—Part of line impossible—Want of funds.*—Where a railway company have obtained an Act of Parliament, reciting that the making of a specified line of railway "will be of public advantage," and that they are willing to make the whole, and enacting that "it shall be lawful for them to make such line," and giving them compulsory powers of taking land for that purpose, and they have, in partial exercise of such powers, taken lands, and made part of their line, there is an obligation upon them to complete the whole of the line specified in the Act, in respect of which a *mandamus* will lie. The same principle applies where the portion not completed is a deviation-line, substituted for a corresponding portion of the original line authorized to be abandoned by a subsequent Act of Parliament. Such a *mandamus* may issue on the application of a landowner whose land would be required for the specified line, or is prejudiced by the making of it. *Semble*, also, that a similar obligation to complete the line exists towards the public and the shareholders in the company. A line from A. to D., passing through B. and C., was authorized by Act of Parliament. The portion between A. and B. was made, and that between C. and D. had become impossible by reason of the expiration of the powers when the writ issued: Held, that this was not a good return to a *mandamus* requiring the completion of the part between B. and C., as to which the powers were still in force. A suggestion that the line if made would be unnecessary or inconvenient, from the nature of the locality, or unremunerative, is no answer to the writ; nor is it any answer that the funds which will, in reasonable probability, come to the possession of, or be disposable by the company, will fall short by 100,000*l.* of the sum necessary for making the railway in question. If a company, carrying out the design with good faith and prudence, were, from unforeseen casualties, left without funds: *Semble*, that the Court in its discretion would not grant a *mandamus*. The above points were held by Lord Campbell, C. J., and Crompton, J. Held, by Erle, J., that such an

Act of Parliament using permissive, and not imperative words, imposes no obligation on the company of making the line thereby authorized, although they have exercised some of their powers by making part of the line. The obligation, arising from taking land, is fulfilled by making and opening an available railway, as far as the land is taken. *Reg. on prosecution of Burton and another v. The York and North Midland Railway Company*, 22 Law J. (N. S.) Q. B. 41.

6. *Obligation created by Act of Incorporation—Words of permission—Mandamus—Duty to raise funds—Return.*—Where a company have obtained an Act of Parliament enacting that “it shall be lawful” for them to make a railway, and giving compulsory powers of taking land for that purpose, upon a representation that it will be for the public benefit, and that they are willing to execute the proposed work, there is a contract and obligation with the public and the land-owners to make the railway attaching from the moment when the Act receives the royal assent, and the performance of which will be enforced by *mandamus* at the instance of a landowner along the line, although the company have never availed themselves of any of their powers, and although the existence of those powers may be limited to a specified period. An Act of Parliament declaring a proposed railway to be for the public benefit, equally imposes an obligation on the promoters to construct the line, whether the words authorizing its construction are permissive or imperative. The writ of *mandamus* called upon the company to take all necessary steps, both as to the purchase of lands and otherwise for making and completing, and to make and complete the railway. The Act of Parliament authorizing the railway enabled the company to raise the necessary capital by the creation of shares and by mortgage. By the Lands Clauses’ Consolidation Act (s. 16) the subscribing of the capital is made a condition precedent to exercising any of the compulsory powers for the purchase of land. There was no allegation in the writ that any money had been raised by shares or mortgage: Held, that, assuming section 16 to apply to the case of an existing company obtaining powers to construct additional works, the writ required them to raise the requisite funds in the mode pointed out by their Act; and that it must be assumed that they had the power of doing so. A return to the writ, merely alleging that the company had taken no steps towards making the railway, is no answer. The above points were so held by Lord Campbell, C. J., Coleridge, J., and Crompton, J.; *dissentiente* Erle, J. *Reg. on the prosecution of Hinchcliff v. The Lancashire and Yorkshire Railway Company*, 22 Law J. (N. S.) Q. B. 57.

And see COVENANT.

RAILWAYS CLAUSES’ CONSOLIDATION ACT, 1849, 8 & 9 Vict. c. 20, ss. 13, 14, and 15.—*Deviation—Tunnel.*—Under the 13th, 14th, and 15th sections of the Railways Clauses’ Consolidation Act, 1849, 8 & 9 Vict. c. 20, where a tunnel is marked on the de-

posited plans of a railway, the line cannot be deviated within the limits of deviation, but the tunnel must be made on the place indicated, unless there be an agreement or a provision in the special Act to the contrary. But if the railway be wrongfully deviated where a tunnel is laid down, the railway company is not bound to make a tunnel on the line so deviated. *Little v. Newport, Abergavenny, and Hereford Railway Company*, 22 Law J. (N.S.) C. B. 39.

RATE.—*Infirmary*—"Public building."—A local Act imposed a certain rate on "all halls, gaols, chapels, meeting-houses, schools, almshouses, and other public buildings, churchyards, chapel-yards, and meeting-house yards, for every yard running measure of the length in front of such halls, gaols, chapels," &c. An infirmary for sick persons, supported by voluntary contributions, stood within its own ground, the principal entrance to which was on the south-east side from a public highway; there was also an entrance on the north-west side from a public road by a private avenue through pasture-land, not occupied by the governor of the infirmary; and on the north-east side it was bounded by a public footway, which extended beyond its grounds along the pasture-land up to the above-mentioned public road; but there was no entrance from this footway to the infirmary: Held, first, that the infirmary was a "public building" within the meaning of the statute; secondly, that the rate ought to be assessed according to the running measure on the whole of the south-east side, and on so much of the north-east side as the foot-path extended in front of the grounds of the infirmary, but not beyond, or on the north-west side. *Governors of the Bedford Infirmary, appellants; The Commissioners for improving the Town of Bedford, respondents*, 2 Exch. 768.

REMOVAL OF CAUSE. See **BAIL**.

REPLEVIN.—1. *Avowry*—*Time of rent accruing.*—*Replevin.* Avowry, "that the plaintiff for a long time, to wit, for all the time during which the rent hereinafter mentioned to be distrained for was accruing due, and from thence until, and at the said time when, &c., held and enjoyed the said close, in which, &c., as tenant thereof to the defendant, by virtue of a certain demise thereof theretofore made, at and under a certain rent, to wit, the yearly rent of 80*l.*; and because a large sum, to wit, the sum of 80*l.*, of the rent aforesaid, for a certain time, to wit, one year, ending on the 29th September, A.D. 1851, on the day and year last aforesaid, and from thence until and at the said time when, &c., was due and in arrear," the distress was taken. Plea in bar, *riens en arri re*. At the trial it was proved that there was no rent due for the year ending the 29th September, 1851, but that a portion of the previous year's rent was due: Held, that the plaintiff was entitled to the verdict. *Roskrugge v. Caddy and Mayne*, 22 Law J. (N.S.) Exch. 16.

2. *Notice of trial*—*Documentary evidence.*—The defendants in an action of replevin having obtained a verdict, a rule for a new trial was granted, on the ground that certain evidence had been impro-

perly admitted. This rule was made absolute. The plaintiff gave a fresh notice of trial, but afterwards gave notice of discontinuance; and the cause was not again tried. On the taxation, the costs of certain searches for documentary evidence (not including the evidence objected to), which had been made use of on the first trial, were allowed to the defendants, as well as the charge of drawing and copying the old briefs: Held, that as these matters would have been available if the cause had been tried again, such costs were properly allowed. *Daniel v. Wilkin*, 8 Exch. 156.

RESPONSIBILITY. See CARRIER.

RIGHTS OF THE CROWN. See CHANCERY PRACTICE.

RIGHT OF COMMON.—*Obstruction*.—*Immemorial right*.—Where a house obstructs the exercise of a right of common, the commoner may, after notice and request to the plaintiff to remove the house, pull it down, though the plaintiff is actually inhabiting and present in the house. A right claimed by user, under stat. 2 & 3 Wm. 3, c. 71, can only be co-extensive with the user; and an issue on a plea justifying under such a right, is an issue, not upon the right, but the user, and differs, therefore, from an issue on a right claimed by prescription. Defendant, in trespass, pleaded that for thirty years before suit, he and all occupiers for the time being, had enjoyed common of right, and without interruption, in, upon, and throughout a close called P.; and issue was joined on a traverse of this plea. The close P. was 3,000 acres in extent; an interruption, by inclosure, of ten acres had been acquiesced in for a year, and the trespass complained of was committed on these ten acres: Held, that as defendant would have proved his plea by proof of user on the place only where the trespass was committed, the plaintiff was entitled to a verdict. A plea claiming an immemorial right of common in occupiers for the time being, is bad after verdict. *Davis v. Williams and others*, 16 Q. B. 546.

SCRIPHOLDER. See JOINT STOCK COMPANY, 1.

SET-OFF.—*Debt due to executor*.—Where a defendant is sued as executor for a debt which accrued due from his testator during his lifetime, he may set off a debt which has accrued due from the plaintiff to him as executor, since the death of his testator. Such debts are mutual, and due in the same right, within the meaning of the 2 Geo. 2, c. 22; the second clause of which, authorizing the setting off against an executor of debts due from the testator, does not limit the operation of the preceding clause. *Mardall v. Thelluson and others, executors of Theobald*, 21 Law J. (N. S.) Q. B. 410.

SHERIFF.—*Discharge fee*—*Distringas*.—Where a sheriff has levied 40s. on the defendant on a *distringas*, to compel an appearance; and judgment having gone by default, the defendant afterwards pays the debt and costs, and applies to the sheriff for a return of the 40s., the sheriff is not entitled to deduct 4s. 6d., or any other

sum, as a fee for returning the issues. *Taylor v. Warrington*, 22 Law J. (N. S.) Q. B. 99.

SHIP.—1. Carriers by sea—Damage by rats.—Damage done to goods on board a ship by rats is not within any of the exceptions in the ordinary bill of lading, and the shipowner is liable for such damage, although there are cats on board. *Quære*, whether damage caused in consequence of rats making a hole in the ship and letting in the water, would be within the exceptions in the bill of lading. *Laveroni v. Drury and another*, 22 Law J. (N. S.) Exch. 2.

2. Freight—Charter-party—Agent—Taking of goods.—The defendant chartered a ship to bring from Bombay, at 3*l.* 5*s.* per ton, a cargo not being his own, but for the purpose of making a profit, on an increased rate of freight. The defendant's agents filled the carrying part of the vessel, and then the cabin, with their own goods, which were consigned to the defendant, as their factor, for sale. There was contradictory evidence as to the amount to be paid for the cabin freight. The defendant refused to pay the plaintiff more than 3*l.* 5*s.* per ton for the freight of the cabin goods; but had charged his agents with the payment of 7*l.* per ton, and had allowed them commission at that rate. The goods having been stopped for the non-payment of a bill of exchange given in respect of them, the defendant, after the commencement of the action, the bill having been paid, obtained possession of the goods: Held, first, that the judge rightly directed the jury, that although the defendant's agents at Bombay had no authority to put the goods into the cabin; yet, if they did so, and the defendant, on the ship's arrival, took to them and received the freight, he was bound to pay the plaintiff the current freight, and was not confined to the charter freight of 3*l.* 5*s.* per ton; and, secondly, that the action was not brought too soon, for that the taking to the cabin cargo for the purpose of obtaining the freight, rendered the defendant liable, irrespectively of the possession obtained after action brought. *Micheson v. Nichol*, 21 Law J. (N. S.) Exch. 323.

3. Chartered vessel—Insurance—Del credere commission.—The plaintiffs, merchants at Smyrna, chartered a vessel to proceed to Salonica, and there having loaded a cargo of Indian corn, to proceed to a safe port in the United Kingdom. The plaintiffs accordingly shipped at Salonica 1,180 quarters of Indian corn; and on the 22nd of February, 1848, the master signed a bill of lading, making the corn deliverable "to order of the plaintiffs or to their assigns, he or they paying freight as per charter-party." The plaintiffs endorsed the bill of lading, and sent it, together with the charter-party, to B., their London agent, with orders to sell the cargo on their account, and they also through B. insured the cargo "at and from Salonica to the port of discharge in the United Kingdom, &c.: corn warranted free from average, unless general, or the ship be stranded." On the 1st of May, 1848, B. employed the defendants' corn-factors in London to sell the cargo, and sent them the bill of lading endorsed, the charter-party, and policy of

insurance, and they advanced 600*l.* on the cargo. The custom of corn-factors is to sell under a *del credere* commission, and when so selling, not to mention the purchaser. On the 15th of May, 1848, the defendants sold the cargo to C., and sent him a bought note, which stated that he had bought of them "1,180 quarters of Salonica Indian corn of fair average quality when shipped, at 27*s.* per quarter, free on board, and including freight and insurance to a safe port in the United Kingdom; payment at two months from this date, upon handing over shipping documents." On the same day the defendants wrote to B., advising him of the sale, but without making any mention of the purchaser or of commission. The vessel sailed from Salonica on the 23rd of February; and having met with tempestuous weather, the cargo became so heated and fermented, that the vessel was obliged to put into Tunis Bay, where the cargo having been surveyed, was found to be unfit to be carried farther; and on the 24th of April it was sold. On the 23rd of May, C. gave the defendants notice that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. In March, 1849, C. became bankrupt. The plaintiffs brought the present action against the defendants to recover the price of the cargo, and declared specially on a *del credere* guarantee: Held, first, that the true meaning of the contract (which could not be explained by evidence of mercantile usage) was, that the purchaser bought the cargo if it existed at the date of the contract; but that, if it had been damaged or lost, he bought the benefit of the insurance; and therefore he was bound to pay the stipulated price in a reasonable time after the bill of lading and other shipping documents were handed over to him. Pollock, C. B., *dissentiente*. Secondly, that the defendants were responsible by reason of their *del credere* commission, although there was no guarantee in writing signed by them, since this was not an undertaking to pay the debt of another, within the 4th section of the Statute of Frauds. Thirdly, that the plaintiffs were entitled to judgment, *non obstante veredicto*, on a plea which stated, that, at the time the defendants were employed to sell the corn, it was heated and fermented, and had been unloaded and sold; that the defendants and C. were ignorant of the premises; and that C. in a reasonable time after the sale, and before the time of payment, repudiated the contract. *Conturier and others v. Hastie and others*, 8 Exch. 40.

4. *Partner — Loading vessel on freight*, "no freight being owner's property"—*Partnership accounts*.—S., a partner in a firm at Liverpool, and sole owner of the ship "Ellen," entered into an arrangement by which the "Ellen" was, in 1850 and 1851, consigned, during several voyages, to H., a partner in the firm of H. and C. H., at New Orleans, with general instructions to do the best he could, either in loading the vessel on freight, or shipping cotton, on the joint account of S. and H. On those occasions, as is usual when cotton is shipped on account of the shipowner, a nominal freight, or "no freight being owner's property," was inserted in the bills of lading; but in stating the partnership

accounts in respect of the sale of the cotton, the current rate of freight was charged in favour, and to the debit of the joint adventure. On the 4th of April, 1851, S. wrote to H. in these terms: "We hope you have bought cotton, and that the 'Ellen' has arrived. What you do we will confirm." Again, on the 26th of April: "Whatever you do for the 'Ellen' will be confirmed by us." On the 8th of May, 1851, H. and C. H. shipped on board the "Ellen" 447 bales of cotton; and the master signed a bill of lading, by which the cotton was "to be delivered unto order or to assigns, he or they paying freight for the said cotton; 1s. per bale being owner's property, when draft against same is paid—say 3,590*l.* 9*s.* 8*d.*, with primage and average accustomed." On the 15th of May, H. and C. H. again shipped 881 bales of cotton, and a similar bill of lading was signed by the master; the draft for 3,590*l.* 9*s.* 8*d.*, dated 8th of May, 1851, was for the invoice price of the cotton, and was on the firm of which S. was a partner, and was purchased on the day of its date by the plaintiffs, merchants at New Orleans, who took at the same time, from the shippers, an endorsement in blank of the first bill of lading, as a security for the due payment of the draft. A bill of exchange, dated 15th May, 1851, for 3,169*l.* 19*s.* 8*d.*, was in like manner drawn for the price of the cotton in the second bill of lading; and that bill of exchange was also purchased by the plaintiffs, the second bill of lading being also endorsed to them. In both cases the cotton was purchased of third persons, and not of the plaintiffs. These bills when due were dishonoured by S. and taken up by the plaintiffs. On the 10th of May, 1851, S., being indebted to the defendants, assigned to them the "Ellen," by way of mortgage, with all her freight and earnings, with power of sale and authority to receive freight. The "Ellen" arrived at Liverpool on the 28th of July, 1851, when the defendants took possession of her and her cargo, and claimed from the plaintiffs, as endorsees of the bills of lading, payment of the current rate of freight. The plaintiffs tendered the amount of freight reserved by the bills of lading, which being refused, they paid the amount claimed, under protest, and brought this action for money received to their use: Held, that the plaintiffs were entitled to recover, since the circumstances showed a clear authority from S. to H. to ship the cotton upon the terms of the bills of lading; and although the second of those bills was signed after the mortgage, yet it did not invalidate the transaction as against the plaintiffs, who took the bills *bonâ fide* and without notice. *Brown and others v. North and another*, 8 Exch. 1.

STAMP.—1. *Agreement—Fraud—Trotting-match.*—In an action by the plaintiff against a stakeholder to recover a sum of money deposited as a wager on a trotting-match by the plaintiff, whose horse was beaten; the plaintiff, for the purpose of proving fraud, which consisted in one horse having been substituted for another, tendered in evidence an unstamped agreement relating to the match: Held, admissible. *Holmes v. Sixsmith*, 21 Law J. (N. S.) Exch. 312.

2. *Memorandum incorporating agreement*.—By an agreement, which recited that A. and others had applied to Parliament for a Bill to authorize them to reclaim from the sea certain waste land, in which B. and C. claimed certain interests, and that B. and C. had objected to the Bill, it was agreed that B. and C. should withdraw their opposition, and promote the Bill, and should respectively receive certain portions of the land when reclaimed; and that A. and others should pay to B. 1,000*l.* on the passing of the Act. After a few weeks a memorandum was endorsed on the paper on which the agreement was written, to the effect that it was agreed that B. and C. were only severally, and not jointly, bound for the fulfilment of the written agreement; that the 1,000*l.* within mentioned to be paid to B., were for costs and expenses of certain surveys, and that the written agreement for facilitating the Bill was only to be in force for the then existing session of parliament. The agreement contained more than 1,080 words, and was stamped with a 35*s.* stamp. The memorandum contained less than that number, and was stamped with a 20*s.* stamp: Held, that the memorandum did not incorporate the agreement, so as to make it necessary to count the words of the agreement in the number of the words of the memorandum, for the purposes of the stamp-duty; and that even if it did incorporate it, there was no provision in the Stamp Act to justify the reckoning the words of the agreement in estimating the amount of duty to which the memorandum was liable; consequently, that the 20*s.* stamp was sufficient. *Fishmongers' Company v. Dimdale and others*, 22 Law J. (N. S.) C. B. 44.

3. *Mortgage*—55 Geo. 3, c. 184—*Assignment to indemnify surety*.—Where A. had entered into a bond as surety for B., and B., by deed, assigned personal property to A. for the purpose of indemnifying him against any liability by reason of his having become surety for B. in the bond: Held, that the deed required an *ad valorem* stamp as a security for the repayment of money to be thereafter lent, advanced, or paid, within the meaning of the 55 Geo. 3, c. 184, schedule Mortgage. *Lord Canning v. Roper*, 22 Law J. (N. S.) Q. B. 87.

THOROUGHFARE. See HIGHWAY.

TOLLS. See INLAND NAVIGATION.

TRESPASS.—1. *Breaking doors—Clandestine removal—Distress*.—To a declaration in trespass for breaking and entering a close of the plaintiff, called the stable, and breaking the doors thereof, and for seizing and carrying away divers goods and chattels of the plaintiff's therein, the defendant pleaded, under the 11 Geo. 2, c. 19, s. 1, that, at the time when the trespasses were committed, one O. O. was tenant of certain premises to the defendant at a certain rent, and that half a year's rent was then due to the defendant from the said O. O., and in arrear and unpaid; and that within thirty days before the said time when, &c., O. O. fraudulently and clandestinely conveyed from the premises, held by him as such tenant, the goods and chattels in the declaration mentioned, being the proper goods and chattels of

the said O. O., in order to prevent the defendant from distraining them for the rent in arrear, and that because the said goods and chattels so fraudulently and clandestinely conveyed by O. O. still remained in the said close, in which, &c., and were there locked up, to prevent them from being seized as a distress for the said arrears of rent; the defendant, whilst the rent remained due, and within thirty days after the said goods and chattels had been so clandestinely and fraudulently conveyed and locked up, entered the said close, in order to seize and take the said goods and chattels as a distress for the said arrears of rent so due, and did at the time when, &c., and within thirty days after the said goods and chattels had been so conveyed as aforesaid, seize them as a distress for the said arrears of rent; and that, because on that occasion the said goods and chattels were put and kept in the close locked up, so as to prevent them from being seized as a distress for the said arrears of rent, and so that the defendant could not, without breaking open and entering the said close, seize the said goods, the defendant was obliged and did, in order to seize the said goods, first calling to his assistance the constable of the place where the said close and goods were, according to the form of the statute, and with his aid and assistance, in the day-time break open and enter the said close, in order to seize the said goods and chattels for the said arrears of rent, according to the statute; and that the defendant, in so doing, did no unnecessary damage, &c.: Held, first, that although it was stated in the plea that the goods were the tenant's at the time of the removal, it admitted them to be the plaintiff's at the time of the seizure, as averred in the declaration, and therefore that the plea was not objectionable in form as amounting to an argumentative traverse, that at the time of the trespass they were the goods of the plaintiff: Held, secondly, that the plea afforded a good *prima facie* defence to the action, within the 11 Geo. 2, c. 19, s. 1. It is unnecessary, in a plea framed under this statute, to show that the goods have not been made the subject of a *bona fide* sale to persons not privy to the fraudulent removal, as provided by the 2nd section; that fact must be replied. It is also unnecessary to state in the plea that the party upon whose land the goods are seized is privy to the fraud; and a previous request is unnecessary, in order to give the landlord the right to break into the premises for the purpose of seizing the goods. *Williams v. Roberts and others*, 7 Exch. 619.

2. Light and air—Pulling down stable—Removal of obstruction.—

To an action of trespass for entering a close of the plaintiff's and pulling down a stable, the defendant pleaded that he was possessed of a dwelling-house adjoining the plaintiff's close, and was entitled to have the light and air enter through a certain ancient window therein; that the stable wrongfully and unlawfully obstructed the light and air, and darkened the window; wherefore he entered the plaintiff's close, and pulled down the stable to remove the obstruction. To this plea the plaintiff replied *de injuriâ*: Held, on special demurrer, that the replication was good, as the plea consisted merely of excuse; that it

neither claimed any interest in the plaintiff's land, nor set up such a right by virtue of an authority from the plaintiff, within the true meaning of the rule, which precludes the adoption of this general form of replication. *Thompson v. Eastwood*, 8 Exch. 69.

And see FALSE IMPRISONMENT.

TROTting-MATCH. See STAMP, 1.

UNIFORMITY OF PROCESS. See PRACTICE.

USE AND OCCUPATION.—*Corporation, Liability of*.—Where a corporation have actually used and occupied land for the purpose of their incorporation by the permission of the owner: *Semble*, that they are liable to be sued in *assumpsit* for use and occupation, notwithstanding they have not entered into a contract under their common seal. But in case of a railway company sued under the above circumstances, where the 8 & 9 Vict. c. 16, s. 97 (the Companies Clauses' Consolidation Act), provides that any contract which, if made between private persons, would be valid, though made by parol only, may be made by parol on behalf of the company by the directors, and shall be binding on the company: Held, that such a contract might be presumed to have been entered into, and that the company was therefore liable to the action. *Lowe v. The London and North-Western Railway Company*, 21 Law J. (N. S.) Chan. 361.

VOTE. See PARLIAMENT.

VOTING-PAPER. See MUNICIPAL CORPORATION.

WILLS.—1. *Devise—Leaseholds*.—A testator by his will, made in 1815, gave all the rest, residue, &c., of his personal estate, goods, and chattels, &c., to M. J. D. absolutely; and he further devised "all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, &c. at or near W. in the county of D., and B. in the county of Y., and all other his real estates in the said counties and elsewhere, and all his estate and interest therein," to uses in strict settlement. In 1841 the testator made a codicil ratifying and confirming his will. At the time of his making his will, and of his decease, the testator was possessed of freehold estates in the county of D., and of some church leases in the same county, which were usually renewable every seven years. In some instances the leaseholds were let and occupied with the freeholds at undivided yearly rents. Upon part of the leaseholds nearest to the freehold mansion, ornamental cottages were built, as well as buildings occupied by persons employed about the mansion and freehold estate: Held, that under the 1 Vict. c. 26, s. 26, the leaseholds passed under this general devise, and that no contrary intention appeared upon the will so as to prevent the operation of that section. *Wilson v. Eden*, 21 Law J. (N. S.) Q. B. 385.

2. *Devise before Wills Act—Fee-simple*.—A testator, by his will (made before the passing of the 7 Wm. 4 & 1 Vict. c. 26), devised as follows:—"I give and bequeath to my son, J. W., all that farm or estate I bought of Mr. B. of London, containing about twenty acres, situate at the Quinton, in the parish of H., in the county

of S., and in the occupation of myself, my son G. W., and W. J.:" Held, that the son took an estate in fee-simple in the property. *Burton v. White and another*, 7 Exch. 720.

3. *Devise for life—Rent in tail—Dying without leaving issue.*—A testator, by his will (made A.D. 1826), devised as follows:—"I give and bequeath unto my wife Elizabeth, the lands, &c., to hold the same unto her and her assigns for and during her natural life; and after her decease, I give and devise the same to my nephew, S. J., his heirs and assigns for ever; provided always, and my will is, that in case it should happen that my said nephew shall depart this life, before he shall have attained the age of twenty-one years, and if, after he shall have attained such age of twenty-one years, he shall die unmarried, or having been married, without lawful issue, then I give the same unto my brothers, T. J. and J. J., &c., and their heirs for ever, as tenants in common." Held, that the testator's nephew, S. J., did not take an estate tail, but an estate in fee-simple in the lands; with an executory devise over to the testator's brothers, in the event of S. J. dying under twenty-one, or after that age, dying without leaving lawful issue at the time of his death. *Doe d. Johnson v. Johnson*, 8 Exch. 81.

4. *Wills Act—Trust—Estate of trustees—Children—Minority.*—By a will (made before 1838), a testator devised as follows:—"I give and devise to A., B., and C., and their heirs and assigns, all that (naming the premises), upon trust; nevertheless, to receive the rents and profits, and, after deducting all taxes and expenses whatsoever, to pay the same unto such persons and for such purposes as my daughter E. M. shall direct, and for want of such direction, to and for her sole and separate use; and from and immediately after the decease of my said daughter, upon trust to pay and apply the said rents, &c., for and towards the maintenance and education of my said daughter's children then living, during their minority; and upon the youngest living of my said daughter's children attaining the age of twenty-one, I give and devise the said house and premises unto all the children of my said daughter who shall be then living, in equal shares and proportions, share and share alike." In one of the devises contained in the will, an estate in fee was devised to the testator's grandson, on attaining twenty-one years; and by a concluding clause of the will, the testator, as to the residue of his estate not before specifically disposed of, devised and bequeathed the same to his eldest son, to hold to him, his heirs, executors, administrators, and assigns, according to the nature of the several estates, absolutely for ever; and the testator also authorized his trustees, at their discretion, from time to time to grant leases of any part of the premises, in trust, for any term not exceeding twenty-one years, at the best rent that could reasonably be obtained, but without taking any fine for such leases: Held, that the estate of the trustees, and their heirs, was to continue only for such time as the objects of the trust required it; and that the power to lease was a power only to be exercised during the continuance of this estate, so limited to them;

and, therefore, that the three grandchildren of the testator did not take a fee in the premises in question, but took estates for life only, as tenants in common. *Doe d. Kimber v. Cafe*, 7 Exch. 675.

WITNESS.—*Privilege—Answer tending to criminate.*—A witness called to support a plea, that the consideration for a bill was money lost at play, stated that he was present when the money was alleged to have been lost, in his own house, but saw no gaming. He was then asked, Was there a roulette-table in the room? The judge told him that his answer might tend to subject him to a prosecution, under the 8 & 9 Vict. c. 109, s. 2, for keeping a common gaming-house, and the witness declined to answer: Held, that the witness was not compellable to answer, as his answer might have had that tendency, and that the judge did right in cautioning him. *Semble*, per Jervis, C. J., and Maule, J., that it is for the witness to determine whether his answer may tend to criminate him. *Fisher v. Ronald*, 22 Law J. (N. S.) C. B. 62.

WRIT OF TRIAL.—*Assessor's notes—Insufficient affidavit.*—A rule nisi for a nonsuit, in a cause tried before the assessor of the Liverpool Passage Court, was moved for by counsel and granted. The rule was drawn up on reading the writ of trial, and an affidavit verifying the assessor's notes: Held, on cause shown against the rule, that without the affidavit the Court had no materials on which to entertain the motion. In the affidavit, the deponent described himself as S., clerk to E. J., Esq., barrister-at-law, and assessor of the Court of Passage of the borough of L.: Held, insufficient, for not stating deponent's place of residence. *Winch v. Williams*, 21 Law J. (N. S.) C. B. 216.

CRIMINAL AND MAGISTRATES' CASES.

CONTAINED IN

22 Law Journal (N. S.), parts 1 and 3.

BIGAMY.—*Scotch marriage—Proof of foreign law.*—In order to prove that a marriage in Scotland is valid according to the law of Scotland, a witness conversant with Scotch law as to marriage ought to be called. *Reg. v. Povey*, 22 Law J. (N. S.) M. C. 19.

BRIDGE.—*Isle of Wight—Liability to repair—Statute—Rebuilding by justices—Foot-bridge.*—The Isle of Wight is a division of the

county of Southampton, but has no separate commission of the peace. Before 1842, all public bridges in the Isle of Wight not repairable by tenure were repaired either by the tithings in which they were situate, or by rates in the nature of county rates, levied on all the parishes in the island, under the following arrangement:—The Isle of Wight having been assessed to the general county rate, and appeals against such assessment having been made in 1774, an arrangement was made by an order of Quarter Sessions, and by consent, fixing certain proportions to be paid by the parishes in the Isle of Wight towards the general county rate, but leaving the expense of bridges and houses of correction to be raised by a local rate; the said island being adjudged and declared not to be liable to pay to the county bridge-rate or to the house of correction, the Isle of Wight agreeing to erect and maintain houses of correction and bridges within the island at its own expense. Accordingly, from 1774, the practice was for the Quarter Sessions of the county, on the application of the justices for the Isle of Wight division, to levy a rate, in the nature of a county rate, on every parish in the island, for the repair of the bridges and bridewell in the island; and this local rate, and not the general county rate, was always expended in such repairs. In 1813, a local Act of Parliament passed, by which commissioners were appointed for managing the roads and highways in the island, and which enacted that all bridges, &c., which had previously to the passing of the Act been repaired by any tithings, &c., should for the future be repaired in the same manner and by such ways and means as other bridges, usually called county bridges, within the island had been accustomed to be repaired: Held, that all bridges which, at the time when the local Act passed, were repairable by the tithings, were thenceforward repairable by the county generally, and that the conventional mode of assessing the island alone to a rate for the repairs of its bridges and bridewell, under the arrangement of 1774, could not affect the legal liability of the county, or be any answer to an indictment against it for non-repair of such bridges. A bridge in the Isle of Wight was, after the passing of the above local Act, wholly rebuilt by order of the justices for the island division out of the island-rate before mentioned. The construction of the new bridge was materially different from, and it stood higher up the stream than, the former bridge. None of the forms required by the 43 Geo. 3, c. 49, were observed in building the new bridge: Held, that the county remained liable to repair the new bridge. A foot-bridge, formed by three planks about nine or ten feet long, and a hand-rail, which carries a public footpath over a small stream, is not such a bridge as the county is bound to repair. *Reg. v. Inhabitants of Southampton*, 21 Law J. (N. S.) M. C. 201.

CERTIORARI.—*Beer license*—*Board of Inland Revenue*.—A license for the sale of beer granted by the solicitor of excise, without the production of a certificate from the overseer, required by 3 & 4 Vict. c. 61, s. 2, is not a judicial act, removable into this court by *certiorari*. *Reg. v. Overseers of Salford*, 21 Law J. (N. S.) M. C. 223.

CONVICTION.—*Licensing Act—Gaming.*—A conviction, which states that a keeper of a public-house, licensed under the 9 Geo. 4, c. 61, has been "guilty of an offence against the tenor of his license, that is to say, that he knowingly suffered a certain unlawful game, to wit, the game of dominoes, to be played in his house," is bad, as the game of dominoes is not itself unlawful, and playing at dominoes does not necessarily amount to "gaming" within the meaning of the license. *Reg. v. Ashton*, 22 Law J. (N. S.) M. C. 1.

COSTS OF PROSECUTION.—*Indictment by order of Lord Mayor.*—An indictment for an assault was preferred by order of the Lord Mayor of London, and removed into this court by a *certiorari* obtained by the defendant, who was afterwards found guilty. The City solicitor had the conduct of the prosecution, and the costs, it appeared, would be defrayed out of a fund provided for such purposes by the corporation: Held, that the costs of the prosecution could not be recovered under the 5 Wm. & Mary, c. 11, s. 3, that section being intended to indemnify a prosecutor against costs which he would otherwise be liable to pay. *Reg. v. Wilson*, 22 Law J. (N. S.) M. C. 53.

CRIMINAL LAW.—*Bail—Charge of murder.*—Where a person has been committed upon a charge of wilful murder found by a coroner's jury upon evidence sufficient to support the finding, this Court will not admit him to bail, especially where the accused has made a statement admitting his participation in the affair out of which the charge of murder arises. *Ex parte Baronnet and others*, 22 Law J. (N. S.) M. C. 25.

EVIDENCE.—*Attesting witness who is dead—Lost document—Proof of handwriting.*—In order to prove a deed, a witness was called, who stated that it was destroyed, and that he had seen the names of the parties to it in their respective handwriting. He also stated that the instrument bore the name of one B. as an attesting witness, that B. was dead, but that he did not know B.'s handwriting, or whether the said name of B. was written by B.: Held, that under the circumstances secondary evidence of the contents of the deed was admissible without further proof of the handwriting of B. Per Erle, J.—Where a document is lost, and the attesting witness to it is dead, there is no necessity for proving his handwriting. *Reg. v. Inhabitants of St. Giles's, Camberwell*, 22 Law J. (N. S.) M. C. 55.

FALSE PRETENCES.—*Indictment—Ownership of property—Intent to defraud.*—The omission in an indictment for obtaining money, &c., by false pretences, to state whose property the money obtained was, is not a formal defect, which is cured after verdict, by section 25 of the 14 & 15 Vict. c. 100; nor does section 8 of the same statute, which enacts that it shall be sufficient in such indictments, to allege that the defendant did the act with intent to defraud, without alleging the intention to be to defraud any particular person, render it unnecessary to state the ownership of the money, &c., alleged to have been obtained by the defendant. *Hesbante Wightman, J. Sill v. Reginam (in error)*, 22 Law J. (N. S.) M. C. 41.

INDICTMENT.—1. *Removal of—False pretences.*—The Central Criminal Court Act (4 & 5 Wm. 4, c. 36, s. 16) provides, that the Court of Queen's Bench, or the commissioners under that Act, being judges of the superior courts, or the judges of the Court of Bankruptcy, or the Recorder of London, may issue writs of *certiorari*, or other process, to remove into the Central Criminal Court indictments found at the sessions for London, Middlesex, &c., for any offences cognizable by virtue of that Act: Held, that this does not repeal the 7 & 8 Geo. 4, c. 29, s. 53, which enacts that no indictment for obtaining money, &c., by false pretences, shall be removed by *certiorari* into the Court of Queen's Bench; but that it authorizes the several judges there specified to issue writs, in the nature of writs of *certiorari*, to remove indictments for any offences there cognizable into the Central Criminal Court, from the sessions there mentioned. *Reg. v. Sill*, 21 Law J. (N. S.) M. C. 214.

2. *On repealed statute—Arrest of judgment—Repeal after proceedings.*—After a statute has been repealed, it cannot be acted upon in respect of a proceeding under it commenced before its repeal; and in this respect there is no valid distinction between matters of form and substance. Where, therefore, between the finding of an indictment for non-repair of a road and plea pleading the statute upon which alone the indictment could be supported was repealed, and afterwards the indictment was proceeded with, and a conviction obtained, the Court arrested the judgment. *Reg. v. Inhabitants of Denton*, 21 Law J. (N. S.) M. C. 207.

LARCENY.—1. *Offering stolen property for sale.*—S. was in the habit of supplying J. S. with bags. When he had made a quantity, he used to place them outside J. S.'s warehouse-door, and either come himself or send his wife shortly after for payment. M., who was servant to J. S., by previous arrangement with S., took a number of bags of J. S.'s out of his warehouse, and placed them outside the warehouse-door, as the new bags used to be placed. Shortly after S. came to J. S. and asked for payment, saying he had just made the bags and brought them there, and that they would be J. S.'s property when he had paid for them: Held, that M. was guilty of larceny of the bags, and S. guilty of being an accessory before the fact. *Reg. v. Manning and Smith*, 22 Law J. (N. S.) M. C. 21.

2. *Sheep—Original taking not felonious.*—Where the prisoner, by mistake, drove away with his flock of sheep one of the prosecutor's lambs, and afterwards, on finding out that he had the lamb, immediately sold it as his own: Held, that as the original taking was not rightful, but was an act of trespass, the subsequent appropriation was a larceny. *Reg. v. Riley*, 22 Law J. (N. S.) M. C. 48.

LUNATIC PAUPER.—*Order of maintenance—Removal to asylum by order of clergyman.*—The 12 & 13 Vict. c. 103, s. 5, which enacts that the cost of maintenance of a lunatic pauper, who, if not a lunatic, would have been irremovable, under the 9 & 10 Vict. c. 66, shall be borne by the common fund of the union, and not by the parish of settlement, is confined to cases where the lunatic is

removed to the asylum under an order of justices; and does not apply when the removal to the asylum was under the order of an officiating clergyman and a relieving officer, according to the 8 & 9 Vict. c. 12, s. 48, in which case the order for maintenance must be made on the parish where the lunatic is adjudged to be settled. *Reg. v. Inhabitants of St. Leonard's, Shoreditch*, 22 Law J. (N. S.) M. C. 51.

MISDEMEANOUR.—*Indecent prints and libels*—*Indictable offence*—*Writ of error*.—In some counts of an indictment the defendant was charged with unlawfully and knowingly obtaining and procuring indecent and obscene prints and libels, in order and for the purpose of afterwards publishing and disseminating them; in other counts, with unlawfully and knowingly preserving and keeping in his possession indecent and obscene prints and libels, with the intent and for the purpose of afterwards publishing and disseminating them: Held, on writ of error, that the former counts were good, as the obtaining and procuring the indecent prints and libels for the purpose alleged, was an act done in commencing a misdemeanour, and, therefore, an indictable offence; but that the latter counts were bad, as they alleged no act done, and the possession of the prints and libels may have been come by innocently. *Dugdale v. Regnam (in error)*, 22 Law J. (N. S.) M. C. 50.

PENALTY.—*Alehouse Act*—*Payment to treasurer of county—Town certificate*.—On a conviction under the Alehouse Act, 9 Geo. 4, c. 61, by justices of a borough which has a separate commission of the peace, but no court of Quarter Sessions, the portion of the penalty which, by sec. 126, is to be paid to the treasurer of the county or place for which the justices are acting, must be paid to the treasurer of the county in which the town is situated, and not to the treasurer of the borough. *Reg. v. Dale*, 22 Law J. (N. S.) M. C. 44.

PERJURY.—*Costs of prosecutor*—*Party grieved*.—Where a defendant was convicted on an indictment for perjury, in an affidavit removed by himself by *certiorari* into the Court of Queen's Bench, the prosecutors were held entitled to costs, under the statute 5 & 6 W. & M. c. 11, as parties grieved or injured, although the false swearing failed of its effects, and the prosecutors were only interested as executors in the suit in which the false affidavit was made.—*Reg. v. Major*, 21 Law J. (N. S.) M. C. 221.

POOR-RATE.—1. *Liability to*—*Birkenhead Dock trustees*—*Public purposes*.—It is not of itself a ground for exemption from poor-rates that the occupiers of land are trustees incorporated under Acts of Parliament for public purposes. It must appear from the provisions of the Acts to have been the intention of the Legislature that the funds derivable from their occupation should not be applied to the payment of poor-rates. The trustees of the Birkenhead Docks were empowered by the Acts incorporating them, and providing for the construction of the docks, &c., to borrow a certain sum on credit of the rates and tolls granted by the said Acts, and of any property thereby vested in them, and if necessary to mortgage the same. The

maximum tolls and dues to be demanded and received by the trustees were stated in the Acts, but the trustees were at liberty to fix and determine the tolls to be taken, provided they did not exceed the amount stated in the Act, and from time to time to reduce or alter and again to raise such tolls. The Acts further provided, that all sums arising from the sale of any lands, or the rents thereof, should be applied by the trustees in keeping in repair and maintaining the docks and other works made under the authority of the Acts, and of paying officers and servants and otherwise carrying the Acts into execution, and also to the payment of interest and repaying the principal borrowed, under such regulations and conditions as the trustees might from time to time think reasonable: Held (assuming all the purposes to which the trustees were directed to apply the sums received by them to be public purposes), that, as there was nothing in the Acts to show that the trustees might not lawfully raise from the rates and tolls a sum sufficient to meet such purposes, and pay poor-rates and other charges, they were liable to be rated to the poor-rate in respect of buildings upon the land vested by the Acts in the trustees. *Reg. v. Trustees of Birkenhead Dock*, 21 Law J. (N. S.) M. C. 209.

2. *Waterworks—Occupation by commissioners—Net value—Principle of calculation.*—The commissioners of the Huddersfield waterworks, under two private Acts of Parliament, were the proprietors of reservoirs, &c., in the township of Longwood, for the supply of water to the town of Huddersfield, and to secure a supply of water to certain millowners and occupiers in Longwood. The commissioners were bound by their Acts to furnish water gratis in case of fire, to supply it at one penny per 100 gallons for watering the streets, and to the consumers at certain specified rates, so calculated, that the water-rates were not in any one year, after payment of the expenses, to exceed 7l. 10s. per cent. on the amount which should be owing by the commissioners in respect of the loan which they were empowered to raise on mortgage of the works and water-rents; and after the discharge of the whole of the said loan, the water-rents were to be reduced, so as merely to cover current expenses. The commissioners were rated to the relief of the poor on the sum of 490l., the Sessions finding that sum to be the estimated net rateable value of all the reservoirs, pipes, and other apparatus in Longwood, taken in connection with, and as part of, the entire works in Longwood and Huddersfield, being made up of 300l., the estimated net annual value of all the reservoirs, and 190l., the net annual value of the pipes and other apparatus in Longwood. The Sessions also found that a tenant of the entire waterworks, if released from the restrictions in the Acts of Parliament, and able to exercise his discretion as to the amount of water-rents and rates, might calculate with reasonable certainty on a gross revenue of 2,000l.; and that, after deducting 800l., the fair average of the current annual expenses, and the sum of 1,100l., proved and admitted to be a proper annual deduction for repairs, renovations, and tenant-profits, the residue of 1,100l. repre-

sented the net rateable value of the entire works; but that if such tenant was to be considered as subject to the restrictions in the Acts, he could make no profit at all: Held, by Coleridge, J., that substantially the consumers, and not the commissioners as a separate body, were the occupiers and the parties rated, and that the use and employment of the water, and not merely the water-rents, constituted the value of the occupation. That the restriction imposed by the Acts amounted to no more than an arrangement between the commissioners and consumers, as one body, of the terms upon which the benefits of the occupation were to be enjoyed, and could have no bearing on the question of the amount of rateable value as between the consumers and the inhabitants of Longwood. That, therefore, assuming the sum of 490*l.* to be the proper portion of the 1,100*l.*, which, according to the above finding of the Sessions, had been arrived at on a right principle as the net rateable value of the entire works, the commissioners were properly rated on that amount for the township of Longwood: Held, by Wightman, J., and Crompton, J., that the principle put in the finding of the Sessions of a tenant released from restrictions, and at liberty to charge any rates he pleased, did not furnish the proper criterion for ascertaining the rateable value in this particular case; but as no other ground was shown for altering the rateable value from 490*l.*, that sum must be taken to be as found by the Sessions the proper proportion or rateable value. *Reg. v. Churchwardens of Longwood*, 21 Law J. (N. S.) M. C. 215.

PRACTICE.—*Judge at chambers—Jurisdiction—Writ of procedendo.*—A judge at chambers has jurisdiction to make an order for the issuing of a writ of *procedendo* to send back proceedings removed by *certiorari* from an inferior court; and it is a matter for the discretion of the judge whether or not a summons to show cause should not in the first instance be granted. *Reg. v. Scaife and others*, 21 Law J. (N. S.) M. C. 221.

RATE.—1. *Rateable value—Shipbuilding-yard with floating dock.*—The occupier of a shipbuilding-yard on the shore of a tidal and navigable river, constructed a floating dock in the river opposite the yard, which was used in the following manner:—When a vessel required repair, the dock was hauled into deep water, where, by taking out plugs, it was made to sink and ground; the gates were then opened and the vessel hauled into the dock, and allowed to settle down in it as the tide fell. At low tide the dock-gates were again closed and the plugs replaced, and any water that remained was pumped out. With the next tide the dock, with the vessel in it, floated and was hauled towards the shore, and moved by chains about thirteen feet from the building-yard. To enable the workmen to get to their work, a plank was laid from the building-yard to the floating dock. Two of the mooring-chains were attached to anchors in the bed of the river, and two others were fastened to posts standing in the building-yard. When the repairs were finished, the dock was

again sunk in deep water, and the gates being then opened, the vessel was hauled out: Held, that as the floating dock had no necessary connection with the shipbuilding-yard, it could not enhance its rateable value. *Reg. v. Morrison and another*, 21 Law J. (N. S.) M. C. 14.

2. *Tolls—Principle of rating.*—A company was empowered by Act of Parliament to establish a ferry over the river Tyne, where it is public, tidal, and navigable, and to make landing-places on each side of the river, and to take certain tolls from persons passing over the ferry. The bed of the river below low-water-mark was in the parish of N., and the landing-places in the respective townships of N. S. and S. S. The ferry-boats worked by steam did not always pursue the same track in crossing, and were while afloat in the parish of N.; the tolls were collected at the landing-place in S. S. The company were rated as occupiers of "a ferry, landing, and tolls" in N. S., at half the net annual profit of the tolls, after making proper deductions: Held, first, that the tolls could not be rated directly as appurtenant to the landing-places, or indirectly as a profit earned by the use of the landing-places. Secondly, that the rate ought properly to be laid on the landing-place in N. S., according to its value, as enhanced by being available for the purpose of earning the toll. Thirdly, that the mileage principle was not applicable, and that a portion of the profits could not be assessed on the two landing-places, according to the proportions which their dimensions bore to the length of the transit over the river. *Reg. v. The North and South Shields Ferry Company*, 22 Law J. (N. S.) M. C. 9.

REMOVAL, ORDER OF.—*Want of notice—Jurisdiction.*—Where an order of removal has been duly served, but no notice of chargeability or grounds of removal have been sent to the appellant parish, the want of service of these latter documents does not deprive the Quarter Sessions of jurisdiction to hear an appeal against the order of removal; but the omission to serve them may be made the matter of a ground of appeal. *Reg. v. The Recorder of Shrewsbury*, 22 Law J. (N. S.) M. C. 2.

SESSIONS.—*Reviewing decision—Secondary evidence—Proof of search.*—Where the Sessions have decided that sufficient search had not been made for an agreement to let in secondary evidence of its contents, this Court will not interfere with their decision, unless it sees clearly that the Sessions were wrong. An agreement having been traced to the possession of P., a witness was called who stated that he went to P., and asked him whether there was any agreement between himself and the pauper respecting a house. P. said: "I cannot say for a certainty,—I will search;" and then directed his clerk to search. The witness and the clerk then searched P.'s office, and could not find the agreement. P. was not called as a witness. The Sessions held that there was no sufficient proof of search without calling P. The Court refused (upon a case stated)

to interfere with the decision. *Reg. v. The Liberty of Saffron Hill, Hatton Garden, and Ely Rents*, 22 Law J. (N. S.) M. C. 22.

SETTLEMENT.—*Illegitimate child—Removal after sixteen.*—The 71st section of the 4 & 5 Wm. 4, c. 76, which provides, that a child born a bastard after the passing of the Act, "shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right," &c., does not take away the birth-settlement which a child born a bastard had before the Act passed, and such child may, after it has attained the age of sixteen, be removed to the parish of its birth, although the mother, before it had attained that age, had acquired a settlement in a different parish. *The Churchwardens and Overseers of St. Andrew's, Worcester, appellants; The Churchwardens and Overseers of Bodenham, respondents*, 22 Law J. (N. S.) M. C. 39.

SHERIFF, DUTY OF—Clerk of Peace—Liability—Assistant Clerk of Peace—Receipt of fines.—The duty of the sheriff, with respect to the roll of fines sent to him by the clerk of the peace, pursuant to stat. 3 Geo. 4, c. 46, is not purely ministerial, and the sheriff is not justified in levying a fine stated in the roll to be unpaid, when the amount has been paid to the sheriff himself, before receiving the roll. The deputy clerk of the peace is authorized to receive the amount of fines imposed at the Quarter Sessions; and if he receives the money, and omits to notify the receipt in the roll, and damage accrues in consequence to the party fined, the latter may maintain an action against the deputy clerk of the peace for negligence. *Quere*, whether the deputy clerk of the peace is liable for acts of negligence of the assistant whom he appoints, pursuant to stat. 59 Geo. 3, c. 28, to record the proceedings of the justices sitting in a second court at the Quarter Sessions. *Wildes v. Morris*, 22 Law J. (N. S.) M. C. 4.

BANKRUPTCY.

Comprising the Cases contained in
22 Law Journal (N. S.), part 3.

AFFIDAVITS SWORN ABROAD.—*Evidence—Bankrupt Law Consolidation Act.*—An affidavit sworn at New York before a magistrate, with the attestation of a notary annexed, certifying that there was such a person, who was a magistrate of that city, received in evi-

dence under the 243rd section of the 12 & 13 Vict. c. 106. *Ex parte Reid, re Carne*, 22 Law J. (N. S.) Bank. 5.

BANKRUPTCY. — Refusal of certificate — Rehearing.—Where, under the 5 & 6 Vict. c. 122, the commissioner has refused the bankrupt his certificate, he has no jurisdiction to review his decision. The 12 & 13 Vict. c. 106, does not enable the commissioner to review his decision, except upon the special grounds set forth in the 207th section of that Act. *Ex parte Higginson*, 22 Law J. (N. S.) Bank. 11.

PETITION OF APPEAL AGAINST ALLOWANCE OF CERTIFICATE.—A bankrupt having been allowed his certificate by the commissioners, with a suspension for three months, went out of the jurisdiction, and the petitioning creditors appealing against the allowance of the certificate altogether, were unable to serve him with the petition, which was accordingly dismissed with costs as against assignees; but the petitioners agreeing not to present another petition, without costs as against the bankrupt. *Ex parte Eyre, re Belton*, 22 Law J. (N. S.) Bank. 3.

PROOF—Right of—Covenant of marriage settlement.—A trader in his marriage-settlement covenanted with trustees to pay them 3,000*l.* out of the first capital moneys, or real or personal estate, or capitalized income, of or to which he should be or become possessed or in anywise entitled, after the solemnization of the marriage, within six months after he should have become so possessed or entitled. The marriage took place, but the money was not paid. The trader was possessed of stock in trade and other effects far exceeding in value the 3,000*l.* down to the time when he became bankrupt, and for a long time, more than six months after the date of the settlement, more than enough to pay all his debts for the time being, including the 3,000*l.* The trustees tendered a proof, but the same was refused; but on appeal: Held, that, as the bankrupt had property six months after a settlement more than enough to satisfy the 3,000*l.*, and as there was a breach of the covenant by non-payment at the end of six months, the trustees were entitled to prove. *Ex parte Evans, re Wass*, 22 Law J. (N. S.) Bank. 5.

SURPLUS OF BANKRUPT'S ESTATES.—Trustee—Costs—Public policy.—A trader, who was in insolvent circumstances, was the owner of leasehold property, which was charged with an annuity. He committed an act of bankruptcy, and after that A. B. paid off the arrears of the annuity and another sum, making 900*l.*, and with the concurrence of the trader took an absolute assignment of the annuity and arrears. Then the trader was adjudicated bankrupt, and assignees of his estate were appointed, after which A. B. bought the leasehold property so charged, and the same was assigned to a trustee for him. Upon a bill being filed by the assignees, the sale of the annuity and of the leasehold were set aside as fraudulent and void, with costs, to be paid by A. B. to the solicitor of the assignees. An order was made in the bankruptcy, by which it was declared that the order as to costs

in the decree was to be without prejudice to any question between the trader and A. B. The trader obtained his certificate, and the leaseholds having been sold, and all the debts paid, there remained a surplus. The trader assigned all his effects for value, and the purchaser claimed the surplus, but A. B. insisted that he was entitled to be repaid out of it such costs of the proceedings in Chancery and Bankruptcy as he had paid to the assignees; but the Court held that he was not entitled to them as against the trader or his assignee for value, because, if he and the trader were trustees and *cestui que* trust in the purchase, he had set up an adverse title to the trader; and because, if he and the trader had in the purchase combined to defeat the creditors, it would be against public policy to give him the costs: and held, therefore, that the purchaser from the trader was entitled to the surplus. *Ex parte James, re Pratt*, 22 Law J. (N. S.) Bank. 8.

EQUITY.

CHANCERY.

Comprising the Cases contained in

21 Law Journal, part 12.	2 De Gex, McNaghten, and Gordon, part 1.
22 Law Journal, parts 1, 2, and 3.	3 McNaghten and Gordon, part 4.
5 De Gex and Smale, parts 1 and 2.	14 Beavan, part 3.
9 Hare, part 5.	15 Beavan, part 1.
1 De Gex, McNaghten, and Gordon, parts 2, 3, and 4.	

ABATEMENT OF SUIT.—*Certificate to registrar—Costs.*—

When a suit abates, the plaintiff's solicitor should certify this fact to the registrar, in order to prevent its coming into the paper. In cases of default, the defendants are entitled to the costs of the day. *Saner v. Deavin*, 14 Beavan, 646.

ADMINISTRATION.—*Mortgagees—Trustees—Costs.*—Bill by the owner against his mortgagees and the trustees of a fund to compel payment: Held, to be a suit for administration, and not redemption; and the costs of all parties were ordered to be paid out of the fund in the first instance. *Bryant v. Blackwell*, 15 Beavan, 44.

ADMINISTRATION SUIT.—1. *Infant cestui que trust—Contract for sale—Completion.*—In an administration suit instituted by

an infant *cestui que* trust, under a will, against the executors, one of the executors admitted that part of certain sums advanced by him on mortgage formed part of the trust estate. An order was made in the suit for the completion of contracts for sale of the mortgaged property which had been entered into by the executor. Under this order the purchase-moneys were paid into court to the credit of the cause. The order directed the executor to execute the conveyances, and deliver the title-deeds of the petitioners; but the executors' solicitors refused to give up the deeds, claiming a lien upon them for costs due from the executor, and advances made for the maintenance of the plaintiff: Held, that the Court had jurisdiction, on petition, to order the solicitors to deliver up the deeds. *Francis v. Francis*, 2 D. M. & G. 78.

2. *Residuary legatees—Real estate.*—Legatees and annuitants are bound by the proceedings in a suit for administration between the executors and residuary legatees and devisees, although there may be a question as to the debts being primarily charged on the real estate, and which may incidentally affect them. Therefore, after decree in such a suit, legatees cannot sustain an administration suit against the executor. *Jennings v. Paterson*, 15 Beavan, 28.

ADMITTANCE. See COPYHOLD.

AGREEMENT.—*Specific performance—Patentees.*—Bill for the specific performance of an agreement made between patentees for the use of their respective patents, embodied in an order at Nisi Prius, the defendants admitting that they were bound by the agreement, and that it ought to be specifically performed, but disputing its meaning; dismissed, without costs, on the ground that the agreement was framed in terms which were incapable of any certain construction. *Tatham v. Platt*, 9 Hare, 660.

ALIEN.—*Resident abroad—Musical composition—Copyright.*—An alien, resident abroad, composed three musical pieces in a foreign country, and sold the copyright in this country to the plaintiff, a British subject, who published it in London. The work was on the same day published in Prussia. On motion in a suit instituted by the purchaser of the copyright against a person who had, without leave, published the three musical compositions in this country: Held, that the publication was within the Copyright Act, 5 & 6 Vict. c. 45, and the Court granted an injunction restraining the unauthorized publication. The copyright of a work of an alien was sold to a British subject, who published it in this country in 1844. The copyright was infringed in 1849, but the state of the law then rendered it very doubtful whether the copyright was protected, and the purchaser merely protested against it. The Exchequer Chamber had established the general question of copyright in an alien; he filed his bill, and moved to restrain the publication of the pirated work: Held, that there had been no such delay as to disentitle him to an injunction. *Buxton v. James*, 5 D. & S. 80.

ANNUITY.—Vendor and purchaser—Will—Construction—Wills Act.—A testator devised his real estates to a devisee in fee, charged with certain annuities or annual rent-charges to two annuitants: Held, on special case, that the annuitants took the annuities for life; that the 28th section of the Wills Act (1 Vict. c. 26) only applies to estates vested in or in the power of the testator, and not to estates or interests created *de novo* by his will; and that a purchaser could not maintain an objection to the vendor's title, or refuse to execute the contract for purchase, upon the ground that the annuities were given in fee, and not for lives. *Nicholls v. Hawkes*, 22 Law J. (N.S.) Chan. 254.

APPOINTMENT.—Restriction of execution—Deed.—A widow, upon her marriage, settled her real and personal property on herself for life, and reserved to herself a power to appoint by will, during the intended coverture, with remainder over on default: Held, that an appointment by will, after the determination of the coverture, was invalid. Real estate was vested in a trustee in fee for a party for life, with remainder to her children equally: Held, that the children took life estates only, all words of limitation being omitted. Recitals will not be allowed to cut down the clear effect of the operative part of a deed. *Holliday v. Overton*, 21 Law J. (N.S.) Chan. 769.

BANKING COMPANY.—1. Debtor in India—Trustee Act.—A debtor resident in India pledged shares held by him in a joint-stock banking company, in England, with an authority by letter to sell, which was communicated by letter to and recognized by the banking company. The creditor, in exercise of the authority, sold the shares to a purchaser. Upon the petition of the purchaser: Held, that the shares were "stock," and that the debtor in India, being constructively a trustee, was a trustee for the purchaser within the Trustee Act, 1850; and the Court made an order directing a specified person to transfer the shares to the petitioner. Under the 1 Wm. 4, c. 60, the Court was prohibited from making any order upon such a petition until the rights of the petitioner had been ascertained by suit, but the Trustee Act, 1850, contains no such prohibition. *Re Angelo, ex parte Frith*, 5 D. & S. 278.

2. Winding up—Petition—Intervention of Court.—The 12th section of the Winding-up Act gives the Court a discretion, and where it appeared that the majority of shareholders were attempting with the creditors to arrange the affairs of a banking company, which had stopped payment, the Court refused, on the application of a single shareholder, to make an immediate order for winding up the company, but ordered the petition to stand over for two months, to enable the company and creditors, if possible, to settle the affairs without the intervention of the Court. *Re the Monmouthshire and Glamorganshire Banking Company*, 15 Beavan, 74.

BANKRUPT.—1. Refusal of certificate—Appeal—Opposition.—A creditor who has not been permitted to oppose the certificate before the commissioner, on the ground of his having omitted to

give the requisite notice of his intention to oppose, cannot be heard in support of the commissioner's decision refusing the certificate, and protection on an appeal from that decision. The bankrupt's certificate will be altogether refused if it appear that he has systematically bought on credit to sell at less than cost price. *Ex parte Holthouse*, 2 D. M. & G. 237.

2. *Petition to annul adjudication—Refusal.*—A petition to annul an adjudication may be presented by a creditor to the commissioner, and it is sufficient if he appeal from the commissioner's decision upon it within twenty-one days, although much more time may have elapsed since the adjudication. The circumstance that an order to annul will leave unimpeached an assignment of all the bankrupt's effects to the creditor applying for the annulling order, is not sufficient ground for refusing to annul an adjudication unsupported by the legal requisites. *Ex parte Bean, re Wilkinson*, 1 D. M. & G. 486.

BANKRUPT LAW CONSOLIDATION ACT.—1. *Certificate—Loss by contract.*—Railway stock is within the 201st section of the Bankrupt Law Consolidation Act, which provides, that no bankrupt shall be entitled to certificate who has within the period mentioned in the Act, lost 200*l.* by any contract for the purchase or sale of any government or other stock. *Ex parte Matheson*, 1 D. M. & G. 448.

2. *Jurisdiction—Appointment of new trustee.*—Under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106, s. 130), every Vice-chancellor has jurisdiction to remove a bankrupt trustee, and appoint a new one in his stead. *Re Heath, re Guider's settlement*, 22 Law J. (N. S.) Chan. 110.

3. *Section 78.*—An order under the arrangement clauses of the Bankrupt Law Consolidation Act granting protection till a day certain, and not till further order, is irregular; and where a trader has obtained an order *ex parte* in that form, it affords no protection against a summons, under the 78th section of the Act. *Ex parte Bower*, 1 D. M. & G. 460.

BARON AND FEME.—1. *Evidence*—14 & 15 Vict. c. 99.—A married woman instituted a suit against her husband, in respect of property come to his hands, which she claimed as belonging to her, and tendered evidence in the suit: Held, that her evidence was not admissible. *Alcock v. Alcock*, 21 Law J. (N. S.) Chan. 856.

2. *Release—Money secured by bond.*—The release by husband and wife of a sum of money secured by bond to A., and payable to the wife after A.'s death: Held, not binding on the wife, on her surviving both A. and her husband. When a *feme covert* is entitled to a reversionary interest in a chose in action, the release of the husband is as inoperative as his assignment to bind his wife's right by survivorship. *Rogers v. Acaster*, 14 Beavan, 445.

3. *Separation-deed—Covenant—Breach—Injunction—Form of suit.*—A husband, in a deed of separation, having entered into a

covenant with trustees not to molest his wife, against whose debts, &c. he was indemnified, will be restrained from doing any act contrary to the terms of his covenant. *Sanders v. Rodway*, 22 Law J. (N. S.) Chan. 230.

4. *Settlement—Wife's equity—Assignment—Debts.*—A married woman being entitled to a reversionary interest in the residuary estate of a testator, joined her husband in assigning it as a collateral security for the payment of 4,000*l.*, &c. He afterwards became utterly insolvent, and unable to maintain his wife and family, three of whom were above twenty-one. A sum of more than 2,000*l.*, part of the fund, fell into possession, and upon the application of the wife, the Court, after payment of costs of all parties, ordered it to be settled for the benefit of the wife and her children, with liberty to apply upon the remaining part of the fund falling into possession. *Marshall v. Fowler*, 22 Law J. (N. S.) Chan. 213.

5. *Trustees' Relief Act—Covenant to settle.*—Upon the marriage of an infant, the husband, by an ante-nuptial settlement, covenanted, that upon his wife attaining the age of twenty-one, he would join and concur with her, if she would consent thereto, in settling upon her and the children of the marriage certain property, to which she would become entitled, for her separate use. The wife attained her age of twenty-one, and refused to join in settling the property: Held, that the settlement was inoperative. After the wife had attained her majority, information was given by her to the trustees of the will, under which she was entitled to the above property, that a bill would be filed against them, charging them with breaches of trust, and seeking an account. The trustees, after this notice, paid her share into court, under the Trustee Act. Upon petition for payment of the money out of court, the trustees were refused their costs. *Re Waring*, 21 Law J. (N. S.) Chan. 784.

6. *Widow—Trading—Bill for declaration of rights.*—A widow, on the death of her husband, entered into possession of the small real and personal property he had left, and out of its rents, and by carrying on his trade, maintained herself and his five infant children, the three eldest of whom were his children by a former marriage. Shortly after the husband's death, a bill was filed in the names of all the children by the maternal grandfather of the three eldest, as their next friend, for a declaration of the rights of the infants, and for accounts, and the appointment of guardians, and of a receiver. The infant plaintiffs, by their next friend, presented a petition in the cause, containing imputations against the widow of improper treatment by her of the infants, and asking the appointment of guardians and of a receiver. The Court directed a reference to the Master, who, by his report, approved of the widow and her co-executor as the guardians of all the children, and found that the whole income ought to be allowed for their maintenance. The Court, on petition, confirmed this report, and directed that the receiver should pay all the income of the property to the widow for the maintenance of the children, thereby leaving all parties just in the same position as they

had been in before the suit was instituted; and the costs of all the proceedings were ordered to be paid by the next friend, and all further proceedings were stayed until further order. *Anderton v. Yates*, 5 D. & S. 208.

BENEFIT BUILDING SOCIETY.—*Mortgage on leaseholds—Redemption.*—The owner of shares in a benefit building society gave a mortgage security on leaseholds, for sums advanced to him by the society in respect of his shares; he subsequently claimed to be entitled to redeem the premises so mortgaged, upon the terms of repaying the amounts advanced to him by the society, less the amount of subscriptions which he had paid, and the proportion of profits in the society to which he was entitled; and he instituted a suit for redemption accordingly: Held, by the Lord Chancellor dismissing the bill, that he was not entitled to redeem except upon the terms of paying all sums which, according to the rules of the society, were then due, or might thereafter become due, during the probable duration of the society. *Seagrave v. Pope*, 1 D. M. & G. 783.

CHARITY.—*Trust funds—Investment—Real estate.*—The Court will sanction the sale of a piece of land which in 1747 was purchased by trustees with charitable funds, and conveyed to them, it being plainly advantageous to the charity. It will also sanction the re-investment of the money in real estate, and the Court will confer upon the trustees powers to perpetuate themselves as well as to lease the land, there being such powers in the deed conveying the land to the trustees originally purchasing. *Ex parte Overseers of Poor of Eccleshall*, 21 Law J. (N. S.) Chan. 729.

CLERGY.—*English Presbyterians—Scotch church—Free church—Costs.*—A chapel was founded in England, and was used, and service therein was performed according to the mode of worship in the established church of Scotland: the Court below held that no person could enjoy the office of minister who was disqualified to be a minister in the established church of Scotland, and it being proved that the minister had become so disqualified, he was ordered to be removed, and the trustees who co-operated with him were also removed, and he and they were ordered to pay the costs of the suit. He and they appealed from the decree, but the same was wholly affirmed. Lord Chief Justice Cranworth dissenting from part of the decree, by which the Court below declared, that no minister or other person is qualified for or is competent to exercise the office of minister or pastor without being a licentiate and recognized minister of the established church of Scotland, and in full connection therewith. An application was subsequently made to suspend the execution of the decree of the Court below, pending an intended appeal to the House of Lords, but the Court refused the motion with costs. *The Attorney-General v. Murdock*, 21 Law J. (N. S.) Chan. 694.

COAL-MINE.—*Tenant for life—Mistake—Tenant in tail—Tres-*

passing upon mine—Erroneous allegation.—A tenant for life of a coal-mine filed a bill, setting out documents which showed this to be the state of his title, but by mistake alleging that he was tenant in tail. The prayer of the bill was to restrain the lessees of a conterminous mine from trespassing upon his mine, and to obtain an account and payment of the proceeds of their alleged wrongful workings in it. After an interim order was obtained, the suit was compromised in October, under an agreement, whereby the defendants were to pay the plaintiff 400*l.*, which he agreed to accept, the full value of all coals to be raised from the mine in question, with costs to be taxed in the then next Michaelmas Term, and if reasonable security to the plaintiff's satisfaction were given, six months were to be allowed for the payment: Held, 1. That the erroneous allegation of title in the bill could not be regarded as having led to such a misapprehension of it as would prevent a Court of Equity from enforcing the agreement for compromise. 2. That under the agreement the defendants were not entitled to have the plaintiff's title deduced and verified. 3. That the compromise could not be enforced by petition in the original suit, but that a new suit was properly instituted for this purpose. *Richardson v. Eyton*, 2 D. M. & G. 79.

COMMON LAW JUDGES—*Assistance of, in equity.*—Application for the assistance in equity of a common law judge, under the 14 & 15 Vict. c. 88, is to be made through the Lord Chancellor. *Hay v. Willoughby*, 22 Law J. (N. S.) Chan. 10.

COMPANY.—1. *Contributory—Irregular transfer.*—By the deed of settlement of a joint-stock company, the directors were specifically authorized to purchase shares of members under certain circumstances, but the deed contained no express prohibition restricting the directors from buying up shares generally. The company becoming embarrassed, summoned an extraordinary general meeting, at which a resolution was passed, authorizing the directors to purchase and take a transfer of the shares of any member who would lend the company a sum of money equal to the purchase-money of his shares. The notice calling the meeting did not state, as required by the deed, the specific object for which the meeting was called. At a subsequent general meeting, at which the resolution was read, the directors were authorized to give further time to the members who had not yet complied with the terms of the resolution. W. L. then sold his shares to a trustee for the company, upon the terms stated in the resolution, and died before the transfer was effected, and the directors, at the instance of his executor, completed the requisite formalities of the transfer: Held, that the resolution of the extraordinary meeting was invalid for want of due notice, and that the subsequent ratification of the same was inoperative, as in excess of the powers of a general meeting, and the executor of W. L. was properly retained on the list of contributories without qualification. Observations on the difficulty of applying the doctrine of acquiescence to joint-stock companies. Where partnerships, as in the

case of joint-stock companies, consist of a great number of individuals, the Court will hold them in their transactions strictly to the terms of the partnership contract. *Re Vale of Neath and South Wales Brewery Company*, 21 Law J. (N. S.) Chan. 688.

2. *Same—Power of attorney.*—In July, 1849, A. gave B., the secretary of a joint-stock company in the course of formation, a power of attorney, authorizing him to execute the deed of settlement in the name of A. for five shares. In August a correspondence passed between A. and B. to this effect. A. desired to terminate all connection with the society. B. requested A. to pay the calls. A. hoped the directors would excuse him, and B. stated that the directors would not release him. Nothing further took place between A. and B. In October the company was completely registered, and B. executed the deed of settlement in the name of A. The company was wound up: Held, that A. had not revoked the power of attorney, and was properly placed on the list of contributories of the company in respect of five shares. *Re The Sea, Fire, and Life Assurance Society, ex parte Barton*, 21 Law J. (N. S.) Chan. 781.

3. *Retiring member—Release against losses.*—By the terms of a joint-stock banking company's deed of settlement, it was, among other things, provided that nothing in the deed contained should release a retiring member from his share of the losses sustained by the company up to the period of his retirement, and also that the half-yearly balance-sheets should, as between shareholders, be binding and conclusive. A. B., a shareholder, duly transferred his shares, and the two balance-sheets immediately preceding the transfer showed the affairs of the company to be in a prosperous condition. Four months after the transfer the bank suspended payment, and upwards of three years after that time an order was obtained for the winding up of the company. The person who prepared the balance-sheets deposed, that there were in fact considerable losses sustained by the company in the two years preceding the transfer: Held, nevertheless, and affirming the decisions of the Master and the Vice-chancellor, that A. B. was not liable as a contributory. *Re North of England Joint-Stock Banking Company*, 2 D. M. & G. 118.

4. *Retired directors—Indemnity.*—A decree was made declaring that an incorporated company were bound to indemnify its retired directors, and a reference was made to the Master. An order being afterwards made to wind up the company, the official manager was substituted in the suit. On further directions, an order for payment and indemnity was made on the official manager, and the Master was directed to make proper calls on the contributories for that purpose. Form of order in such a case where the plaintiffs were themselves contributories. *Gleadon v. Hull Glass Company*, 15 Beavan, 200.

5. *Same—Action.*—A joint-stock company overdraw its account with its bankers, and was subsequently ordered to be wound up. The amount of debt was disputed, and the public officer of the bank (also a company) carried in a claim before the Master, who refused

to admit it as a claim until the debt was proved at law. The Master of the Rolls admitted the claim, and directed an action to be brought; but, upon appeal to this Court, it was held, that although the order at the Rolls was correct in admitting the claim, it must be altered by giving the public officer of the bank liberty to bring such action against such person or persons as he should be advised. *Ex parte The East of England Banking Company, re The Norwich Yarn Company*, 21 Law J. (N. S.) Chan. 822.

6. *Same—Appeal from order for winding up, for calls for expenses.*—Seven persons were elected managing committee of a company, and performed acts in that character. The scheme proved abortive. Actions were brought against one of the seven, and he obtained an order for winding up the company. Others of the seven had made a similar attempt, but were not in time to do so before the order was actually obtained. An official manager was appointed, and the order was prosecuted with the concurrence of all seven. Four of the seven appealed from the order for winding up, and also from an order for a call to pay the costs and expenses and the debt; but it was held, first, that whether the order for winding up were rightly or wrongly made, the four could not move to discharge it; and, secondly, that the order for the call was properly made on the seven members of the managing committee. *Ex parte Woolmer and others, re The Direct Exeter, Plymouth, and Devonport Railway Company*, 21 Law J. (N. S.) Chan. 883.

7. *Breach of trust.*—A railway company was formed, and a large number of shares in it were allotted, and a considerable sum paid in respect of deposits on the shares. A managing committee of the company was appointed, and a finance committee with power to draw cheques. By the direction of the managing committee, large sums, part of the company's funds, were employed in purchasing shares in the market. The Master, to whom the winding up of the company was referred, charged the members of the finance committee with these sums, on the ground that the managing committee was implicated in the breach of trust. The Master's order was overruled. *Re London and Birmingham Extension Railway Company*, 21 Law J. (N. S.) Chan. 835.

8. *Calls—Policies of assurance.*—A. subscribed the deed of settlement of a joint-stock company, instituted for the purpose of granting assurances on ships, for 1,000 shares of 25*l.* each. By the deed of settlement it was declared that a deposit of 2*l.* 2*s.* should be paid on each share, and that a further call of 2*l.* 2*s.* might be made by the directors; but that no further call should be made without a previous resolution of the shareholders assembled at a general meeting. The company granted several policies. The company was afterwards made bankrupt under the 7 & 8 Vict. c. 111, and debts were proved against it to the amount of 70,000*l.* and upwards. It was afterwards ordered to be wound up under the Joint-Stock Companies Winding-up Act. The Master placed A. on the list of contributories, and made an order that he should pay 25,000*l.* Motion that the order as

to the call should be discharged was refused. *Re Merchant Traders' Ship, Loan, and Assurance Company, ex parte Lord Talbot*, 21 Law J. (N. S.) Chan. 846.

9. *Same—Contributory—Devisee.*—A. was the holder of shares in a joint-stock company, the members of which had by covenant, not binding their heirs, engaged that the partnership should continue for ninety-nine years; that there should be no right of survivorship, and that the shares should be deemed personal estate. A. died in 1838, having by his will devised his real estate to B., and appointed C. his executrix. At the time of his death the company were solvent, and all the then existing liabilities were afterwards discharged. C., after A.'s death, was treated as the proprietor of the shares, and for five years received dividends upon them, as executrix. The company became insolvent, and it appearing that the testator's personal estate was exhausted, B.'s name was put on the list of contributories, in his character of devisee of the real estate: Held, reversing the decision of the Court below, that B. was rightly placed on the list of contributories. The statute 3 & 4 Wm. 4, c. 104, charges debts of every description on the real estate of the testator, and a future debt arising out of a previous obligation of the testator is within the Act. *Re St. George Steam-packet Company*, 21 Law J. (N. S.) Chan. 832.

10. *Same—Contributory—Verdict at law.*—An allottee of shares who had paid his deposit and received an undertaking from the directors that the full amount of the deposits should be returned in the event of an Act not being obtained, subsequently signed a declaration and proxy in favour of the continuance of the undertaking. The declaration was filled up at the request of the directors, who stated that it was absolutely necessary for them to proceed to obtain the Act, in order to secure the expenses of the undertaking, which had been guaranteed under an arrangement with another railway company. The scheme having failed, the allottee recovered back his deposits in an action at law. The Master having twice placed his name on the list of contributories, it was held, that the Master's decision must be reversed, and the name expunged. *Re The Dover and Deal Railway Company, ex parte Beardshaw*, 22 Law J. (N. S.) Chan. 15.

11. *Same—Discretion of the Court as to winding-up order.*—A petition was presented by a member of a joint-stock company that the company might be wound up, on the ground that a judgment had been obtained against it, under which any member of it might at any time be called upon to pay 15,000*l.* It appeared in opposition to the petition, that a great majority of shareholders were opposed to it; that the assets of the company, when realized, would be greater than their debts; that arrangements had been entered into with the judgment creditor relative to the debt; that the company had ceased to carry on business, and that they were trying to wind it up themselves. The Court, in the exercise of its discretion, under these

circumstances declined to make the order. *British Alkali Company*, 22 Law J. (N. S.) Chan. 241.

12. *Same—Liability of individual contributories—Jurisdiction of Master.*—Directors of one railway company passed a resolution to lend money to the directors of another company, on their personal responsibility, and the money was so lent, and some of the directors signed a guarantee for repayment. Under an order for winding up the company, the directors of which borrowed the money, a claim was carried in on behalf of the lending company, but it was disallowed; and on appeal, it was held, affirming the decision of the Master, that where a company or association is ordered to be wound up, the Master had no jurisdiction, under the order, to take cognizance of a claim not alleged to be due from the company, but only from individual members of it, and that it made no difference that the money was applied for the purposes of the company. *Ex parte Wryghte, re The Great Western Extension Atmospheric Railway Company*, 21 Law J. (N. S.) Chan. 807.

13. *Same—Master's jurisdiction and review.*—The 17th section of the Winding-up Amendment Act, 1849, is retrospective, as well as prospective, and gives the Master power to review a decision made by him prior to the passing of that Act. *Re North of England Joint-Stock Banking Company, ex parte Crossfield*, 22 Law J. (N. S.) Chan. 208.

14. *Same—Member—Equity—Estoppel.*—Equitable considerations will be regarded in determining whether a party is a member of, or contributory to the liabilities of a company, under the Winding-up Acts. Distinction between the cases where directors are acting in substantial contravention of the objects and scope of their deed of settlement, as in *Ex parte Morgan* (1), *Ex parte Lawes* (2), and where their course of dealing in the transfer of shares has not been in compliance with the strict formalities of the deed. J. S. purchased 120 shares in the company, and the requisite notices of, and consent of, directors to such transfer were given. J. S. did not execute the deed of settlement, but he executed a transfer of ten of those shares, by which he covenanted with the public officer of the company to observe all the stipulations, &c., of the settlement-deed. The settlement-deed provided that one execution of the deed by a shareholder was sufficient for all his shares. J. S. afterwards purchased other shares, making altogether 700. No formal deed of transfer was executed in respect of any of these shares (except as above), but the consent of the directors to such transfer was testified by writing across the notice of sale "transferred," which was signed by one of the directors. The deed of settlement provided that such consent should be testified by the directors signing their names in the margin of the deed of transfer, and that all transfers not made in accordance with the deed of settlement should be void: Held, that the requisitions of the deed had been complied with in substance, and that, by the course of dealing between the parties, the directors could not dispute J. S.'s title, nor J. S. his liability as a

member; and consequently, that J. S. was liable as a contributory in respect of his 700 shares. J. S. sent to the office of the company a deed of covenant, in respect of a transfer of shares apparently executed by himself, though in fact his name was signed by a third party, and he acted under the deed, and received benefits under it: Held, that his executors were estopped from saying that it was not his deed. In case of a contract for purchase of shares, and an incomplete or informal transfer, the vendor had an equity to call upon the purchaser to clothe him with the legal title, and this equity will impress upon the latter the character of a purchaser upon a complete contract. *Re North of England Joint-Stock Banking Company, ex parte Straffon's Executors*, 22 Law J. (N. S.) Chan. 194.

15. *Same—Stamp-office return.*—A joint-stock company was completely registered, and a person applied for and accepted shares, and paid a deposit on the shares allotted to him. The company's deed required that on its execution the names of the parties executing should be entered on the list of shareholders, and be returned to the Stamp-office, &c., and thenceforth they should have the privileges and be subject to the liabilities of shareholders. In this instance, the deed was not executed, but the directors entered and returned, &c., the names: Held, nevertheless, that the names of this person had been properly placed by the Master, under a winding-up order, on the list of contributories to the debts and liabilities of the company. *Ex parte Yelland, re The Port of London Ship-owners' Society and Assurance Company*, 21 Law J. (N. S.) Chan. 852.

16. *Same—Taking up shares.*—A. B. consented to act as a provisional committee-man, and signed an agreement to take one or more shares. He was then requested to take up twenty-five shares out of the one hundred to which he was entitled, and to pay the deposit of two guineas per share. Before paying the required amount, or taking up the shares, the undertaking was abandoned, and the provisional committee-men were requested to pay a sum equal to the deposit upon twenty-five shares, to cover the expenses incurred. This sum was then paid by A. B., and subsequently two further sums to the same amount were paid, upon a threat of being exposed to the legal proceedings. The Master placed A. B.'s name on the list of contributories: Held, upon appeal from this decision, that A. B. had never consented to take up any shares, but had paid the calls upon him *causa pacis*, and his name was therefore struck off the list of contributories. *Re Wolverhampton, Chester, and Birkenhead Junction Railway Company*, 22 Law J. (N. S.) Chan. 218.

CONVERSION.—*Tenant for life—Railway shares.*—A testator, a portion of whose property consisted of railway shares, bequeathed it to certain persons for their lives, and after the decease of the survivor, to the British and Foreign Bible Society, and the Home Missionary Society: Held, that the railway shares must be sold, and the produce invested in stock, and that the question whether the railway shares were within the provisions of the Mortmain Act, was premature. *Thornton v. Ellis*, 21 Law J. (N. S.) Chan. 714.

CONFLICT OF LAWS.—*Colonial law equity—Jurisdiction—Contract.*—A mortgagor, resident in this country, mortgaged by deed, executed in England, to mortgagees, also resident here, real estate in Demerara, and before the mortgagees completed their title to the mortgaged property, according to the laws of Demerara, the mortgagor became bankrupt, and his assignees in this country sold the property and received the proceeds. Whether the rights of the contracting parties have ceased to be governed by the law of Demerara, the *lex loci rei sitæ*, and must be governed by the law of this country, the *lex loci contractus, quære*. *Waterhouse v. Stansfield*, 21 Law J. (N. S.) Chan. 881.

COPYHOLD.—*Devise—Power—Admittance—Fine—Specific performance.*—A testator devised copyholds to such uses as his two trustees, or the survivor of them, or the executors or administrators of such survivor, within twenty-one years after the death of such survivor, should by deed appoint, and subject thereto, to the use of his two trustees, their heirs and assigns for ever; and he directed them to sell the same, and gave them power to give receipts for the purchase-money: Held, that a purchaser who had agreed to buy, was bound to complete, on having a proper deed of appointment from the trustees, without the trustees being first admitted. *Glass v. Richardson*, 22 Law J. (N. S.) Chan. 105.

COSTS. See **ABATEMENT OF SUIT.**

CREDITOR.—*Defective execution of a power—Married woman.*—The trusts of a bond debt, due to A., a married woman, were declared to be for A. for her life for her separate use, with remainder for such persons as A. should by deed, to be executed by her in the presence of two witnesses, appoint, with remainders over. B., the husband of A., was indebted to C. A. signed a letter without any attestation, which contained a declaration that she deposited the bond as a collateral security to C., for the debt due to him from B., and the letter and bond were given to C. The body of the letter had been written by C. and given to B., who placed it suddenly before A., requiring her signature, and in consequence of his urgent request she signed it. In a suit to enforce C.'s lien on the bond: Held, first, that A.'s life interest in the bond was bound by the letter; but secondly, that the Court would not, in C.'s favour, supply the defect in the execution of the power. A woman being entitled to a bond debt, due to her from B., by a settlement made on her marriage in 1829, assigned it to a trustee upon trust for A., for her life for her separate use, with remainders over. In 1836 a part of the debt was paid to A. and her husband. In 1842 C. was appointed sole trustee of the settlement. In 1843 A. charged her life interest in the bond debt, in favour of D., by way of collateral security for a debt due from her husband to D. In 1843 B. died, and A. took out administration to B. Bill by D. against C., to enforce the security, charging him with the wilful default for omitting to get in the part of the debt paid to A. and her husband, and the residue of the debt

due from the estate of B.: Held, that C. was not liable, and the bill was dismissed. *Thackwell v. Gardiner*, 21 Law J. (N. S.) Chan. 777.

DEBTOR AND CREDITOR.—*Specific fund*—*Railway company*—*Equitable assignment*.—An agreement between a debtor and a creditor, that the debt owing shall be paid out of a specific fund, coming to the debtor, or an order given by a debtor to his creditor, upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to his creditor, will operate as an equitable assignment of such debt or funds. A railway company was indebted to A., their engineer, who was greatly indebted to his banker, the latter having pressed for payment or security. A., by letter to the solicitors of the company, authorized them to receive the money due to him from the railway company, and requested them to pay it to the banker. The solicitors, by letter, promised the banker to pay him such money on receiving it: Held, that this did not amount to an equitable assignment of the debt. *Rodich v. Gandell*, 1 D. M. & G. 763.

DEED.—*Illiterate person*—*Evidence of the nature of the instrument*—*Unprofessional person*.—An illiterate person who could not write, signed an instrument, purporting to grant all his property to his wife, as her sole and absolute property, and shortly afterwards died. On a suit instituted by the wife, to have the husband's heir declared a trustee for her: Held, that it was incumbent on the plaintiff to show that the grantor understood the nature of the instrument, and as the evidence merely showed that the instrument had been read over to the grantor by an unprofessional person, who had prepared it, as to whose capacity to explain it there was no evidence, except such as rendered such capacity very doubtful, the bill was dismissed. *Price v. Price*, 1 D. M. & G. 308.

DOWER.—*Equitable bar*.—In the deed of settlement made on the marriage of E. S., an adult female, it was recited that, "for providing a competent jointure and provision of maintenance for the lady, in case she should survive her husband, the father of T. D., the intended husband, had paid to T. D. 3,000*l.*, and the father of the lady had paid to T. D. 851*l.*, and had covenanted to pay him a further sum of 500*l.*; and that it had been agreed that T. D. should give a bond to the trustees of the settlement, conditioned for the payment of 2,000*l.* within six months after the marriage; and it was declared that the trustees should hold the 2,000*l.* upon trusts for the benefit of the husband and wife for their respective lives in succession," &c. T. D. gave the bond accordingly, and died, leaving E. S. surviving him, having paid 500*l.* only in discharge of the bond. After the marriage T. D. acquired real estate, which he sold during the coverture. Upon bill by the wife against the purchaser claiming dower: Held, upon appeal, that the settlement being expressed to be "for providing a competent jointure," must be understood to be in bar of dower, and, reversing the decision below, that the partial non-payment of the

money secured by the bond, did not entitle the widow to claim against the purchaser of the husband's real estates her dower *pro tanto*. Equitable bar of dower depends altogether upon contract, and has no analogy to legal bar of dower under the Statute of Uses. The observations of Sir A. Hart in *Power v. Shiel* (1) disapproved of. *Dyke v. Rendall*, 21 Law J. (N. S.) Chan. 905.

EQUITY.—*Demurrer for want of debtor and creditor account.*—A bill in equity will not lie for a simple case of debtor and creditor account of moneys received and paid by one party on account of another, notwithstanding the bill alleges that the debtor sold property of such plaintiff, and received the proceeds on his account. *Phillips v. Phillips*, 22 Law J. (N. S.) 141.

ESTATE.—*Defendant owner—Receiver.*—A defendant, who is the owner and occupier of an estate subject to a charge which this suit seeks to enforce, will be compelled to attorn to a receiver, and a reference will be directed to the Master to fix an occupation-rent. *Everett v. Belding*, 22 Law J. (N. S.) Chan. 75.

EVIDENCE.—15 & 16 Vict. c. 86.—1. A cause was at issue before the Chancery Procedure Amendment Act and the Orders made under it came into operation, but no evidence had been taken. The Court in the exercise of its discretion, on the motion of the defendants, the plaintiff opposing, ordered that the evidence in the cause should be taken according to the method prescribed by the Act and Orders. *Macintosh v. The Great Western Railway Company*, 22 Law J. (N. S.) Chan. 70.

2. *Parish registers—Extracts—Law of evidence—Amendment Act—Verification of signature.*—Under the 14th section of the statute 14 & 15 Vict. c. 99 (Lord Campbell's Act), extracts from parish registers of baptisms, marriages, and deaths, purporting to be signed, some by the "incumbent," some by the "rector," some by the "vicar," and some by the "curate" of the parishes: Held, to be receivable in evidence, on a petition for the payment of money out of court, the Court considering that each incumbent was an "officer to whose custody," &c., within the meaning of the Act. *Re Hall's Estate*, 22 Law J. (N. S.) Chan. 177.

3. *Defendant—Examination vivâ voce.*—The 15 & 16 Vict. c. 80, s. 15, and the 15 & 16 Vict. c. 86, do not empower the Court to direct an examination of a defendant *vivâ voce* in the Master's office, in a suit at issue before the latter Act was passed. *Rooth v. Tomlinson*, 22 Law J. (N. S.) Chan. 75.

And see **BARON AND FEME.**

FACTORS ACT.—*Validity of pledges.*—The plaintiff consigned pearls to a Liverpool merchant for sale, and drew bills upon him to an amount greater than the value of the pearls, which bills he accepted. The Liverpool merchant then handed the pearls to his London agent to be sold, and drew bills upon him as an advance on account of the pearls. The London agent accepted the bills, having

notice that the pearls had been consigned by the plaintiff for sale. The Liverpool merchant became insolvent, and the bills drawn upon him by the plaintiff were not paid. The London agent sold the goods to repay himself the bills drawn upon him by the Liverpool merchant. Upon bill by the consignor alleging fraud and collusion, and praying that the London agent might be decreed to pay him the amount produced by the sale of the pearls: Held, affirming the decree of the Court below, that the pledge was valid within the 5 & 6 Vict. c. 39, as made *bond fide*, and in the ordinary course of business. Notice to the pledgee of the fact that the goods were transmitted to the consignee with directions to sell simply, will not vitiate the pledge; *secus*, if the pledgee had notice that the consignee was prohibited from pledging. *Navulshaw v. Brownrigg*, 21 Law J. (N. S.) Chan. 908.

FAMILY COMPROMISE.—*Void in equity*—*Married woman*—*Next friend*—*Appellate Court*.—To render a family compromise binding, there must be an honest disclosure by each party to the other of all such material facts known to them relative to the rights and title of either, as are calculated to influence the judgment in the adoption of the compromise; and any advantage taken by either of the parties of the known ignorance of the other of such facts, would render the compromise void in equity, and liable to be set aside. A bill by a married woman suing, by her next friend, to set aside a compromise of her right to certain real estates, as having been fraudulently obtained, against the parties to the fraud and her husband, alleged that the latter had refused to join as co-plaintiff; this refusal was not proved in the cause, and the husband appeared in support of the bill. An objection to the frame of the suit, that the husband ought to have joined as co-plaintiff, held invalid. It is no objection to a decree in favour of a plaintiff, that it must necessarily benefit one of the defendants. When a decree is affirmed upon the general merits of the case, an objection, founded on an obvious inadvertency in such decree, and which might have been taken in the court below, ought not to affect the costs of the appeal, if taken for the first time in the Appellate Court. Observations with respect to prolixity in pleading. *Smith v. Pincombe*, 3 M. & G. 653.

FEME COVERT.—1. *Next friend of*—*Security for costs*.—The next friend of a married woman went to reside abroad; the defendant was held entitled to the security for costs from this next friend, or to have a new next friend appointed. *Alcock v. Alcock*, 21 Law J. (N. S.) Chan. 740.

2. *Suing in formâ pauperis*—*Costs*.—The Court of Chancery having given a married lady leave to sue *in formâ pauperis*, on evidence that she could not procure a next friend, made a decree in her favour. One of the defendants appealed, but the appeal was dismissed with costs: Held, that the appellant defendant must pay the lady herself *dives* costs. *Countess of Mornington v. Earl of Mornington*, 21 Law J. (N. S.) Chan. 738.

3. *Separate use—Husband's debts—Voluntary agreement.*—A married woman, to whom a sum of money was payable for her separate use, received a cheque from the Accountant-General, and handed it over to her solicitor, who accompanied her. The solicitor was on motion ordered to pay the balance to his client, and held that the onus being on the solicitor, to show cause for not paying it over, he could not set up a voluntary agreement to pay her husband's debt out of it. *Mawhood v. Milbanke*, 15 Beavan, 36.

FORECLOSURE. See JUDGMENT CREDITOR.

GUARDIAN AD LITEM. — *Sole defendant — Trustee.* — The Court refused to appoint the solicitor of a trustee his guardian *ad litem*, to put in an answer to a bill of complaint filed against him, though from age and infirmity he was incapable of transacting business. *Patrick v. Andrews*, 22 Law J. (N. S.) Chan. 240.

INCUMBRANCE. — *Merger of charge—Devise of estate.* — Merger of a charge in the inheritance is not to be assumed if it would be contrary to the interest of the owner of the estate and charge. A. devised an estate to his heir, who in his own right had charge on it. The heir bought an incumbrance on the estate, amounting to 11,555*l.*, for 2,000*l.* : Held, that he was entitled to the full amount as against the other incumbrancers on the estate. *Davis v. Barrett*, 14 Beavan, 542.

INJUNCTION. — 1. *Conflict of laws—Scotch corporation—Property in England—Jurisdiction.* — In a suit for the administration of the estate of a testator domiciled in England, and having real and personal estate both in England and Scotland, an injunction will be granted after a decree to restrain a Scotch corporation having large real estates in England from continuing proceedings in the Court of Session in Scotland to obtain payment of a debt which the corporation claimed against the testator as their agent, and that though by the articles of partnership the corporation were entitled to a preferable lien upon the shares of the testator in the corporation. Service of the notice of motion at the office in London is for the purposes of the corporation a good service, where it is admitted that at the head office in Scotland the corporation had notice. *Maclaren v. Stainton*, 22 Law J. (N. S.) Chan. 274.

2. *Negative covenant.* — Mdlle. J. W. agreed in writing with L. that for certain considerations therein expressed she would sing and perform at his theatre for a specified period, and that during her engagement with L. she would not sing elsewhere without his license in writing. Afterwards J. W. contracted with G. to sing and perform in his theatre during the period specified in her engagement with L. Upon bill by L. praying simply that J. W. might be restrained from singing and performing elsewhere than at his theatre during the period specified, the Court granted an injunction accordingly. Where a contract contains covenants to do certain acts, and also to abstain from doing certain other acts, the Court has jurisdiction to restrain the breach of the negative covenants, though there

may be no jurisdiction to specifically perform the affirmative covenants. *Kemble v. Kean* (1), and *Kimberley v. Jennings* (2) disapproved of. But in such cases the Court will decline to interfere where the jurisdiction cannot be beneficially exercised, as in *Collins v. Plumb* (3), or where its exercise would work injustice, as in a case where the consideration for the negative covenant of the one party is the affirmative covenant of the other party, which latter the Court cannot specifically perform, *Hills v. Croll* (4). *Lumley v. Wagner*, 21 Law J. (N. S.) Chan. 898.

INSOLVENT.—*Property—Annuity by way of compensation.*—An annuity awarded to a country commissioner of bankrupts under the 5 & 6 Vict. c. 122, passes to his assignee in insolvency, and is not within the excepted cases mentioned in the 56th section of the 1 & 2 Vict. c. 110. Where the insolvent refused to make the requisite affidavit that he did not hold any public office or employment in the terms of the 58th section of the 5 & 6 Vict. c. 122, the Court allowed other evidence to be given of that fact to enable the assignee to receive the annuity. *Spooner v. Payne*, 21 Law J. (N. S.) Chan. 791.

INSURANCE COMPANY.—1. *Agreement—Policy—Variance.*—If the policy varies from the agreement to effect an insurance, a Court of Equity will interfere, and deal with the case of the insured on the footing of the agreement, and not of the policy. Observations on relief in equity against insurance companies in cases of fraud. *Collett v. Morrison*, 21 Law J. (N. S.) Chan. 878.

2. *Transfer of policies.*—A sum of money was borrowed from an insurance company, and a bond was given to secure the repayment of the money. The borrower at the same time insured his life as a further security, and the bond extended to the payment of the premiums for keeping up the policy. The insurance company having ceased to carry on business, was dissolved, and the affairs being wound up, the company transferred, amongst other things, this bond and policy to another insurance company. No premiums were paid to the second company, and the policy was allowed to drop. The surety in the bond died, and the second insurance company claimed to be creditors against his estate for the amount of premiums unpaid, on the ground that the policies ought to be kept on foot until the money due upon the bond had been paid: Held, as regarded the premiums, that this was not such a contract as the assignees of the first insurance company could enforce, although they had a good claim against the estate of the surety *quoad* the amount secured by the bond. *Atkinson v. Gilby*, 21 Law J. (N. S.) Chan. 848.

INTESTATE'S ESTATE.—*Administrator—Death of—Action against representatives.*—An administrator of an intestate died in 1817, indebted to a large amount in respect of his receipts as administrator, but leaving sufficient personal estate to pay this amount, and also leaving freehold estates. In the same year a suit was instituted for the administration of his personal estate, and in 1832 it appeared from the report in that suit, that his personal estate had

been misapplied, and that his executor had become bankrupt. Thereupon, and in the same year (1832), an administratrix *be bonis non* of the intestate instituted a suit against the administrator's heir, and the sureties in the usual administration bond, and against the representatives of the archbishop (who had died), praying to have the benefit of the bond and to charge by means of it the administrator's freehold estates. No decree was made in this suit, the plaintiff having married in 1838, and having died in 1847, without the suit having ever been revived. In 1848 another of the next of kin, who had been a defendant to the suit of 1832, took out administration *de bonis non* of the intestate, and filed a bill of revivor and supplement, claiming to have the benefit of the suit of 1832: Held, that the suit of 1832 must be considered as having been abandoned, and that the suit of 1848 must be considered an original suit, and as such barred by length of time and laches. *Quere*, whether the circumstance of the administrator dying largely indebted to the intestate's estate, was a breach of condition of the bond. *Quere*, whether the suit of 1832 was in its nature one which it was competent for the plaintiff in that of 1848 to revive. *Quere*, whether either suit could be maintained, the ordinary's personal representative not having declined to lend his name in an action. *Bolton v. Powell*, 2 D. M. & G. 1.

ISSUE AT LAW.—*Misdirection of judge—Lands Clauses' Consolidation Act, section 79.*—An issue was directed to a court of law to ascertain whether the right to certain hereditaments was on a particular day vested in the plaintiffs or in the defendants. The judge directed the jury, that if they could not make up their minds, then, inasmuch as the burthen of proof was on the plaintiffs, they must find for the defendant: the jury, in accordance with this direction, found for the defendant. Upon petition for a new trial, it was held, that this verdict could not be taken as expressing the opinion of the jury that the right was vested in the defendant; that this Court was not at liberty to examine the evidence before the jury in order to decide the question for itself; that the 79th section of the Lands Clauses' Consolidation Act was intended only as a direction to the Court of Chancery how to act, when unable to decide who was entitled to money deposited by a company, and the judge at law had properly omitted to direct the jury to have regard to this section; that the above verdict was not such as this Court could act upon, and a new trial was directed by means of two issues, one to try the right and the other the possession, each party being made respectively plaintiffs in the separate issues. The facts and arguments in this case are fully stated in the judgment. *Freemen of Sunderland v. Bishop of Durham*, 22 Law J. (N. S.) Chan. 145.

JOINT-STOCK COMPANY.—1. *Power of directors—Shareholder—Transfer of shares—Share register list.*—B. S., a shareholder in a joint-stock banking company, sold his shares and gave notice of it to the company, and upon an application by the purchaser he received a certificate, with the signature of three directors, that his

name had been entered on the share register list. Under the Joint-stock Companies Banking Act, 7 Geo. 4, c. 46, s. 8, the company made a return to the Stamp-office, stating that R. S., the vendor, had ceased to be a shareholder. The bank subsequently suspended payment, and upon a call being made, the purchaser of the shares neglected to pay it, in consequence of inability. The bank then made an entry in the share register list stating that the transfer was invalid for want of the consent of a board of directors duly constituted, and they made a fresh return to the Stamp-office, in which they inserted the name of R. S. as a shareholder. A writ of *scire facias* at the instance of the bank was then issued by a creditor of the company against R. S., upon a judgment obtained against the company, and a verdict was obtained against R. S. on the ground that the transfers were invalid for want of strict compliance with the company's deed: Held, upon a bill filed by R. S., that he was not bound to inquire whether the provisions of the deed had been observed, and that he had ceased to be a shareholder; that after the name of R. S. had been removed from the books, the directors had no power under the clauses of the deed to again introduce his name; that as the *scire facias* was issued by the creditor at the instance of the company for their own purposes, they must pay the costs, and an injunction was granted to restrain the levying of execution upon the judgment. *Shortridge v. Bosanquet*, 22 Law J. (N. S.) Chan. 48.

2. *Deceased partner*.—In April, 1847, a joint-stock banking company carrying on business under the provisions of the 7 Geo. 4, c. 46, of which A. was a member, became indebted to B. in the sum of 5,000*l*. A. continued to be a partner until his death, and died in December, 1847. In April, 1848, B. recovered judgment against the public officer of the company. In December, 1848, the usual decree for accounts was made in a suit for the administration of the estate of A. B. presented a petition for liberty to go in before the Master and prove as a creditor against A.'s estate for 5,000*l*. and interest. The petition did not state that the bank had ceased to carry on business, or that any proceedings had been taken to enforce the judgment against the existing partners. The petition was dismissed. *Heward v. Wheatley*, 21 Law J. (N. S.) Chan. 854.

JUDGMENT CREDITOR.—*Foreclosure—Sale*.—On a claim by a judgment creditor against his debtor in respect of certain real estate belonging to the debtor, the Court refused to give a decree of foreclosure. *Footner v. Sturgis*, 21 Law J. (N. S.) Chan. 741.

LANDLORD AND TENANT.—*New letting—Surrender of term*.—A new letting to an old tenant commencing immediately, operates as a surrender of the original term, because the lessor could have no power to create the new term, if the original term had subsisted; and, for a like reason, a new letting to a third party, with the assent of the original tenant, has the same operation. The above principle forms the grounds of the decision in *Thomas v. Cook* (2 B. & A. 119); and the authority of that case ought not to be carried

further than the reason on which it rests. *McDonnell v. Pope*, 9 Hare, 705.

LEASE.—Covenant—Quiet enjoyment—Breach.—A. B. covenanted with his lessee for quiet enjoyment as against any person claiming by, from, or under him. An eviction by a prior appointee of A. B. and C. D. is a breach of the covenant. Held also, that the case was not altered by the grant to the lessee being as far as in his power lay or he lawfully might or could. *Calvert v. Sebright*, 15 Beavan, 156.

LEGACY.—Lapse — Payment to executors.—W. L. by his will directed his executors to pay the residue of his property to M. F.; but in case of her death, then to pay the same to the executors or executrices whom M. F. might appoint. M. F. died before W. L., and by her will gave the residue of her property to J. W., and appointed M. L. her executrix. Upon a bill filed by M. L. against J. W.: Held, that M. L. did not take the residue of W. L.'s estate beneficially, but that she took it as part of the personal estate of M. F., and that she was to hold it upon the trusts and for the purposes of M. F.'s will. *Long v. Watkinson*, 21 Law J. (N. S.) Chan. 844.

LEGACIES.—Fund for payment.—A testatrix by will gave real and personal estate to trustees to pay debts and legacies. By a codicil she devised the said estate to her sister for life, and directed it at her death to be sold for payment of legacies; she then gave various legacies, amounting to 50,000*l.*: Held (upon the personal estate proving insufficient to pay the legacies), that the said estate was not made the primary fund for payment of legacies, and that, subject to the life estate of the sister, the said estate was an auxiliary fund. *Wieldon v. Spode*, 21 Law J. (N. S.) Chan. 913.

LUNACY.—1. Allowances out of estate—Allowance to relation.—Where a lady who had separate property married, and an agreement was made that out of her income certain domestic expenses should be defrayed, and the agreement was acted upon until her lunacy, and the husband continued the same expenses out of her property till his death, and where the lady was under a moral obligation to give her nephew 500*l.*, part of which she gave, and a further part her husband after her lunacy paid out of her property, the Court allowed the executors of the husband to deduct all the money paid for keeping up the establishment after the lunacy till his death, and also the money paid by him to the nephew, before paying over the separate income of the wife to her committees. *Re Hewson*, 21 Law J. (N. S.) Chan. 825.

2. Attendance upon commission—Costs.—Where a petition for a commission of lunacy stated that the alleged lunatic had been of unsound mind for upwards of thirty years, a *cestui que* trust, under a settlement made during the period, was allowed to attend the execution of the commission upon an undertaking to abide by such

order as the Court might make as to any increased costs occasioned by the attendance. *Re Richards*, 1 D. M. & G. 719.

3. *Committee—Loss to estate.*—A sum of money having been lost to the estate of the lunatic, under circumstances which the Court considered to be the fault of the committee in not taking steps to enforce payment, the estate of the committee, who had died, was charged with the same. *Re Swindell*, 21 Law J. (N. S.) Chan. 748.

4. *Funeral of deceased lunatic.*—A lunatic died without leaving ready money to pay the expenses of his funeral, and of whose person and of whose estate there was no committee. The heir-at-law, who was one of the next of kin, petitioned that a sufficient sum belonging to the lunatic should be paid out of court for such purpose; but the Court directed the persons with whom the lunatic had resided to proceed with the funeral, and ordered the petition to stand over. A petition for this purpose is necessary, — a warrant for the Lunatic-office is not sufficient. *Re Townsend*, 21 Law J. (N. S.) Chan. 747.

5. *Leave to attend inquisition.*—A party interested under a deed, executed ten years back, was allowed to attend the execution of a commission *de lunatico inquirendo*, when the lunacy was alleged to have existed for a period antecedent to the date of the deed; but upon an undertaking to abide by such order as the Court might make as to the party's own costs and the increased costs occasioned by the attendance of the inquisition. *Re Richards*, 21 Law J. (N. S.) Chan. 739.

6. *Mortgage—Re-conveyance—Costs.*—The costs of obtaining a re-transfer of premises mortgaged to a lunatic, are to be paid out of the lunatic's estate, where the petition for that purpose is presented by the committee of the estate. If the petition be presented by the mortgagor, he will not be allowed the costs, except in a case where the committee has refused to proceed. *Re Wheeler*, 21 Law J. (N. S.) Chan. 759.

7. *Payment of lunatic's allowance to survivor of two committees.*—Two committees of the estate of a lunatic were appointed, one of whom died, and no new committee was appointed in his place. The estate being small, the Court permitted the income to be paid to the survivor on the production of an affidavit of his solvent circumstances. *Re Noble*, 21 Law J. (N. S.) Chan. 748.

8. *Receipt of rents—Committee.*—Where the income of a lunatic consisted of rents payable weekly, the committee was allowed to receive them before perfecting his securities, he undertaking to perfect them within a given time. *Re Rutter*, 22 Law J. (N. S.) Chan. 178.

9. *Taxation of solicitor's bill.*—Solicitors who claimed costs for taking out the commission, and for other business in the lunacy, obtained an order for taxation, but did not tax. Five years after the order, the lunatic died, leaving real estate but no personal property. The solicitors sued the committees at law, but they set up the Statute of Limitations, and the action failed. The solicitors now presented a petition, praying an order for taxation, with a view to proceedings

to make the order, but without prejudice to any question whether the petitioners had any claim on the lunatic's estate. *Re Hart*, 21 Law J. (N. S.) Chan. 810.

10. *Traverse*.—A person found lunatic by inquisition is entitled as of right to traverse the finding; but before granting the writ, the Court will be satisfied by personal examination that the alleged lunatic is competent to exercise volition upon the subject, and desires to have a traverse of the finding. Where a personal examination of the alleged lunatic by the Court is impracticable, the Court will adopt some other mode of inquiry. *Semble*, whether a party may file a traverse in Petty Bag Office, without the intervention of the Court, *quære*. *Re Cumming*, 21 Law J. (N. S.) Chan. 753.

11. *Wife of—Intestate's estate—Settlement*.—The wife of a lunatic entitled to a share of residue of an intestate's personal estate, filed a bill against her husband, praying a settlement of the fund on herself and children. After inquiries in the lunacy, the committee was authorized to assent to a settlement of one-half of the fund, and by an order made in the cause, it was referred to the Master to approve of a settlement. The Master accordingly approved of a settlement by writing at the foot of the draft, and no further proceedings were had when the lunatic died. The wife subsequently died, having by will disposed of the entire fund: Held, that the proposal in the Master's office had not been proceeded with to such a stage at the time of the lunatic's death as to preclude his wife from retiring from the proposed settlement, and the Court ordered the whole amount of the fund to be paid to the representatives of the wife. *Baldwin v. Baldwin*, 5 D. & S. 319.

MARRIAGE SETTLEMENT.—*In tail—Insolvent—Incumbrances—Priorities—Sale*.—A. B., on his marriage, settled certain estates then in mortgage on himself for life, with remainder to his first and other sons in tail, and covenanted against incumbrances; he afterwards mortgaged other estates, and became insolvent. A bill was filed by his assignee under the insolvency against the several incumbrancers on all the estates, and against the tenant in tail, praying an account of what was due on the several incumbrances, that their priorities might be ascertained, and for a sale or redemption. A decree was made in the suit, directing, that on the plaintiff and defendant (the tenant in tail) paying what was due on the respective incumbrances, the unsettled estates should be conveyed to the party redeeming, and that the settled estates should be conveyed on the trusts of the settlement, and in default of redemption, that the bill should be dismissed: Held, by the Lord Chancellor, that the decree for redemption being permissive only as against the tenant in tail, was correct, and that a decree for a sale would have been improper. *Chappel v. Rees*, 2 D. M. & G. 393.

MERGER OF CHARGE. See INCUMBRANCE.

MORTGAGE.—1. Foreclosure—Decree—Judgment creditors.—Upon a foreclosure claim against the mortgagor and three judgment creditors, a decree was made, that all the three judgment creditors should be foreclosed together, and not successively. *Stead v. Banks*, 22 Law J. (N. S.) Chan. 208.

2. Enforcing securities—Suit for administration.—Where a mortgagee, instead of simply filing a bill to enforce his securities, institutes or adopts a suit for a general administration, and the estate proves deficient, the costs of the suit are to be paid in the first instance out of the estate. *Armstrong v. Storer*, 14 Beavan, 535.

3. Redemption—Arrears of interest.—A. mortgaged an estate in fee to B., and covenanted to pay B. the mortgage-debt and interest. A. died intestate, leaving C. his heir-at-law. At the time of the death of A., an arrear of more than six years' interest was due. Suit for redemption by C. against B. Held, that C. was not entitled to redeem, except on the terms of paying the principal and the whole of the interest due. *Elvy v. Norwood*, 21 Law J. (N. S.) Chan. 716.

4. Transfer—Real and personal representatives of mortgagor.—A. mortgaged real estate to B. for 3,000*l.*, and died, having devised two-thirds of it to C., and one-third to D. and E., in equal moieties. By a deed of transfer, after reciting that B. had required payment of the debt from C., D., and E., which they were unable to pay, and that they had applied to F. to lend them the amount, which he had consented to do on having the repayment secured as thereafter expressed, B., at the request of C., D., and E., conveyed the premises to F., subject to a proviso for redemption, on payment by C., his heirs, executors, and administrators, of 2,000*l.*, and by D. and E., their heirs, executors, and administrators, of 1,000*l.*; and C. covenanted to pay 2,000*l.*, and D. and E. covenanted to pay 1,000*l.*: Held, that, as between the real and personal representatives of D., he had not taken on himself the payment of his share of the mortgage debt. *Hedges v. Hedges*, 21 Law J. (N. S.) Chan. 858.

MORTGAGOR AND MORTGAGEE.—Extinguishment of debt—Redemption.—The owner of a reversion in personalty mortgaged it. He then mortgaged the equity of redemption to a second person, and then agreed to sell, subject to the mortgages, to a third party. The first mortgagee required to be paid off. The mortgagor, in a memorandum reciting that the purchaser had paid the first mortgagee in discharge of her debt out of the purchase-money, agreed to execute an assignment to the purchaser, and until it should be executed, that the purchaser should stand in the place of the first mortgagee: Held, reversing the decree below, that the debt of the first mortgagee was not extinguished, and that the purchaser was entitled to the benefit of that security. The second mortgagee was also mortgagee of the other property of the mortgagor: Held, also, reversing the decree below, that one mortgage could not be redeemed without the other. When an appeal is from part of a decree, the respondents are

entitled, without a cross appeal, to open that part which is not appealed from. *Watts v. Symes*, 21 Law J. (N. S.) Chan. 713.

PARTNER.—*Retiring—Discharge—Proof of—New security.*—A contract to discharge a retiring partner from a debt due from the firm, may be proved either by an express agreement, or by facts and conduct from which it may be fairly inferred. Taking a new security is not of itself sufficient to discharge the retiring partner, but there must also be an agreement, either express or to be fairly inferred, to discharge the old firm. A bank, consisting of three members, were indebted to A. B. In 1837 one of the members died, and a new partner was admitted. A. B. received interest from the new firm until 1841, when they became bankrupt. A. B. went in, and proved against the new firm, swearing that they were indebted to him for money received to his use: Held, that the separate estate of the deceased partner had not been discharged. *Harris v. Farwell*, 15 Beavan, 81.

PARTNERSHIP.—*Dissolution—Construction of articles.*—Under articles of agreement between three partners, the partnership was to be dissolved by notice from any of them on breach of the articles by the others or other. Notice of dissolution having been given by one of the partners, in consequence of a breach of the articles by another, and the third partner having adopted the notice, it was held that the partnership was dissolved as to all, but without the consequences to the non-offending partner, which attached under another clause of the articles to a general dissolution. *Smith v. Mules*, 21 Law J. (N. S.) Chan. 803.

PARTICULARS OF SALE.—*Houses—Rentals—Notice to quit—Specific performance—Wilful default.*—Houses described in the respective occupations of specified under-tenants, and as let to Messrs. I., "at the very low rent of 50*l.* per annum, who have received notice to quit" at a day past, but with a subsequent permission to occupy, on the same terms as before, until the tenements are sold, were contracted to be sold, subject to a condition that the purchaser should be entitled to the rents from a specified day. On completion after that date, the purchaser claimed to be allowed a rent at the rate of 150*l.* a year, the sum which the under-tenants paid the tenant, on the ground that, in allowing the tenant to continue in possession at the rent of 50*l.* a year after the date of the contract for sale, the vendors were guilty of wilful default. On a claim by the vendors to enforce specific performance: Held, that the purchaser not having required the vendors to turn the tenant out, they were not guilty of wilful default in allowing him to remain at the lesser rent, and specific performance was decreed; the plaintiffs accounting only for the lesser rent. *Crosse v. The Duke of Beaufort*, 5 D. & S. 7.

POWER.—1. *Execution—Appointment.*—By a marriage-settlement four different portions of property were limited in the following

manner:—first, the wife was given a general power of appointment over 3,000*l.*, to take effect upon her own death; secondly, the wife had a special power of appointment over the residue of the stocks and funds to be exercised in favour of a particular class of relations, and to take effect, not upon her own death, but upon the death of her husband; thirdly, the wife had a general power of appointment over the plate, furniture, &c., but not to take effect until her husband's death; fourthly, the wife had a general power to dispose of her jewels, trinkets, &c., to take effect upon her own death. The wife's will, which was dated before the Wills Act, and was properly executed in the form prescribed for the execution of the powers in the settlement, commenced: "I S. M. do, by virtue of the power and authority reserved to me by my marriage-settlement, hereby make, publish, and declare this to be my last will and testament." The testatrix then referred specially to her power of appointing the 3,000*l.*, and disposed of it. The third and fourth portions of the property she disposed of without referring to her power. Lastly, she gave and bequeathed, directed and appointed all the rest, residue, and remainder of her moneys, and other her personal estate of whatsoever description, amongst the class of relations pointed out by the settlement, but did not refer to the power. As to the first, third, and fourth portions, no question was raised; but as to the second portion, being the residue, it was held that the will was a good execution of the power. By the settlement the trustees were, after the death of the husband, in case of his surviving his wife, to stand possessed of the residue (above referred to as the second portion of the property) in trust for all and every, or such one or more of the wife's relations in blood at the time of her decease, within the eighth degree of consanguinity to her, in such shares and proportions, and with such future, or executory, or other trusts, being for the benefit of the said relations in blood of the wife within the degree aforesaid, as the wife should by will direct or appoint: Held, that the power to be exercised as to the future or executory trusts for the said relations in blood within the prescribed degree, applied only to those relations living at the death of the wife: Held also, that the appointment which was made by the wife was valid, notwithstanding that the persons who were to take as appointees, and the shares and interests which they were to take under the appointment, were made contingent upon a future event; and that although the fund was appointed not entirely to objects of the power, but partly to objects of the power and partly to strangers, the appointment was nevertheless valid *pro tanto*, that is, it was valid *quoad* those who were objects of the power, and invalid as to those persons who were not properly objects of the power. *Harvey v. Stracey*, 22 Law J. (N. S.) Chan. 23.

2. *Same—Exclusive appointment.*—A testatrix, having an absolute power of appointing a fund, appointed to her three children, or their respective executors and administrators, in such manner as her husband should by his will direct and appoint. The husband, by his will, appointed shares to two of the children, to the exclusion of

the third: Held, that this was an invalid execution of the power, and the three children took the fund in equal shares under the will of the original testatrix. *White v. Wilcox*, 22 Law J. (N. S.) Chan. 62.

PRACTICE.—1. *Default of defendant at hearing.*—If defendant makes default at the hearing, the plaintiff will be only entitled to such decree as the Court considers him entitled to on hearing pleadings and evidence. *Hakewell v. Webber*, 22 Law J. (N. S.) Chan. 96.

2. *Foreclosure—Decree for sale—Procedure Amendment Act.*—A claim was filed for foreclosure before the statute 15 & 16 Vict. c. 86, came into operation. There were several incumbrances; and on application under the 48th section of that Act, the Court made an order for sale of the mortgaged property, and directed accounts of the sums due to the several incumbrancers. *Cator v. Reeves*, 22 Law J. (N. S.) Chan. 19.

3. *Motion—Notice—Service.*—Notice of motion may be well served by leaving it at the unoccupied place of address of the solicitor in the cause who has absconded. *Newton v. Thomson*, 22 Law J. (N. S.) Chan. 20.

4. *Supplemental order—Procedure Act.*—A female ward of Court, before the passing of the statute 15 & 16 Vict. c. 86, married without the leave of the Court. She was the plaintiff in a suit at this time, and upon her marriage the suit was revived against her husband, and under an order of the Court a settlement was made on her and her issue, by which her whole property was vested in trustees. Upon an application on behalf of the plaintiff, under the 52nd section of the statute: Held, that this was a change or transmission of interest within the spirit of the section, so as to authorize the Court to make an order against the trustees under that section to the effect of the usual supplemental decree. *Atkinson v. Parker*, 22 Law J. (N. S.) Chan. 20.

5. *Printed bill—Procedure Amendment Act.*—A printed bill was prepared pursuant to section 1 of the statute 15 & 16 Vict. c. 86; but there being a mistake by the transposition of the Christian names of the next friend, the error was corrected in ink, and the officers declined to file it as a printed bill; but the Court held that the alteration was of so slight a nature, that it did not constitute a sufficient ground for refusing to file the bill, and directed it to be received and filed accordingly. *Yeatman v. Mauseley*, 22 Law J. (N. S.) Chan. 20.

6. *Procedure Amendment Act—Delivery of interrogatories.*—Under the 12th section of the statute 15 & 16 Vict. c. 86, and by the 17th and 18th orders of the 7th of August, 1852, requiring a copy of interrogatories to be delivered "to a defendant or defendants, or his or their solicitor," it is sufficient that such copy be left at the office of the solicitor, and need not be served on the solicitor personally. *Bowen v. Price*, 22 Law J. (N. S.) Chan. 179.

7. *Procedure Amendment Act, s. 52—Order to revive.*—Where a suit had become abated, the Court made an order to revive at the instance of a creditor whose debt had been reported due, and the

report had been confirmed. *Lowes v. Lowes*, 22 Law J. (N. S.) Chan. 179.

PROCEDURE AMENDMENT ACT.—1. *Examination de bene esse.*—The examination of witnesses *de bene esse* is within the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 28). The examination of witnesses *de bene esse* is to be taken by one examiner. *Cook v. Hall*, 22 Law J. (N. S.) Chan. 12.

2. *Guardian ad litem.*—By the 21st section of the statute 15 & 16 Vict. c. 86, the practice of the "Court of issuing commissions to take pleas, answers, disclaimers, and examinations," taken within the jurisdiction, is abolished. A guardian *ad litem* to an infant defendant to a suit who is within the jurisdiction will be appointed without a commission. *Egremont v. Egremont*, 22 Law J. (N. S.) Chan. 108.

3. *Endorsement of bill.*—The endorsement on bill of complaint or claim may be altered, at the discretion of the Court, from the form prescribed by the schedule to the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86), and such endorsement is not required by the Act to be printed, *semble*. *Baines v. Ridge*, 22 Law J. (N. S.) Chan. 110.

4. *Masters in Chancery Abolition Act.*—In directing accounts to be taken under the Masters in Chancery Abolition Act, the form of the order under the old practice, referring it to the Master to take the accounts, is inapplicable, and the accounts are to be directed to be taken in a general form. *Re Catling*, 22 Law J. (N. S.) Chan. 9.

5. *Same—Consideration of Master's report.*—At the hearing of a cause on further directions, the Court, if requisite, will, without order, adjourn the cause to chambers, for the purpose of investigating, with the assistance of the chief clerk, the correctness of the Master's report made under the old practice. *Saunders v. Walter*, 22 Law J. (N. S.) Chan. 11.

6. *Same—Investment of money in purchase of land.*—Where a petitioner prays for investment in lands, the Court, on being satisfied that the investment is eligible, will order the petition to stand over for the opinion on the title of such of the conveyancing counsel of the Court as the petitioner may select, and on the return of such opinion to the Court, an order will be made on the petition. *Re Caddick*, 22 Law J. (N. S.) Chan. 10.

7. *Same—Motion.*—A motion by consent, in a cause, commenced under the old practice, to enlarge a publication, to take the evidence orally under the new practice, and to suppress depositions taken under the old practice, is properly made in court instead of by application at chambers. *Atkinson v. The Oxford, Worcester, and Wolverhampton Railway Company*, 22 Law J. (N. S.) Chan. 15.

8. *Same—Payment of purchase-money into court.*—Where a purchaser of property sold under decree, is satisfied with the title, the application for the payment of the purchase-money into court is to be made to the judge at chambers, under the 15 & 16 Vict. c. 80, s. 26 (Master in Chancery Abolition Act). *Davenport v. Davenport*, 22 Law J. (N. S.) Chan. 11.

9. *Same—Parties—Devises and executors—Mortgage.*—In a foreclosure suit, the devisees and executors of the mortgagor represent the *cestuis que trust* of the equity of redemption, under the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 42, rule 9), and the *cestuis que trust* are not necessary parties to the trust. *Hannam v. Riley*, 22 Law J. (N. S.) Chan. 110.

10. *Parties—Trustees—Settlement.*—In a suit for foreclosure, commenced under the old practice, the trustees of the equity of redemption, if in settlement, do not sufficiently represent the *cestuis que trust* under the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 42, rule 9). The *cestuis que trust* will still be necessary parties to the suit. *Goldsmith v. Stonehewer*, 22 Law J. (N. S.) Chan. 109.

11. *Production of documents.*—Application for production of documents is to be made in the first instance by summons at the chambers of the judge. Questions of difficulty as to the production are to be adjourned to and argued in court (Masters in Chancery Abolition Act, 15 & 16 Vict. c. 80, s. 26). *Thomson v. Teulon*, 22 Law J. (N. S.) Chan. 11.

12. *Revivor and supplement.*—An order and decree of revivor and supplement, in a suit instituted by claim, is within the 15 & 16 Vict. c. 86, s. 52 (Chancery Procedure Amendment Act). *Martin v. Hadlow*, 22 Law J. (N. S.) Chan. 9.

13. *Same.*—An order and decree of revivor and supplement by a plaintiff against a co-plaintiff, in a suit commenced by claim, is not within the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86). A printed special claim of revivor and supplement must be filed. *Yate v. Lighthouse*, 22 Law J. (N. S.) Chan. 9.

14. *Suitors in Chancery Relief Act—Written bill—Printed copy of bill.*—Where a bill was filed in writing (being for an injunction), pursuant to section 6 of the statute of 15 & 16 Vict. c. 86, and had been duly impressed with a 1*l*. stamp, as directed by the 6th of the orders of the 25th of October, 1852, and a printed copy of the bill was within fourteen days tendered to the clerk of records and writs for reception, and to be filed, he refused, on the ground that he was precluded from doing so by the 12th section of the Chancery Suitors Relief Acts (15 & 16 Vict. c. 87); but the lords justices being of opinion that in such a case only one stamp was necessary, ordered the printed bill to be received and filed, but directed that in all cases where a written bill is filed, the same shall be retained in the office together with the printed bill. *Jones v. Batten*, 22 Law J. (N. S.) Chan. 18.

15. *Written bill—Interrogatories—Stamp.*—Where a written bill is filed under the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 6), interrogatories may be filed before the printed copy of the bill is filed. Only one stamp is to be paid for by a plaintiff filing a written and printed copy of a bill. *Lambert v. Lomas*, 22 Law J. (N. S.) Chan. 12.

And see PRACTICE.

PRODUCTION OF DOCUMENTS.—1. 15 & 16 Vict. c. 86.—

A motion by the defendant that the plaintiff should produce, on oath, all the documents in his possession or power relating to the matters in the suit (the defendant not specifying any documents, or giving any evidence that the plaintiff had any), was refused, with costs. *Piott v. Mullins*, 22 Law J. (N. S.) Chan. 72.

2. 15 & 16 Vict. c. 86, s. 20—*Defendant entitled to order*.—No affidavit is necessary to support an application for production on oath of documents, under the 15 & 16 Vict. c. 86, s. 20. The Court has settled an order under that Act requiring the plaintiff to make an affidavit of the documents in his possession, and to produce such as he does not thereby object to produce. A defendant is entitled, of right, to such an order for production, and a delay in making the application does not deprive him of it. *Rochdale Canal Company v. King*, 15 Beavan, 11.

3. *Co-defendant and agent*.—Under an order that one of the defendants should allow the plaintiffs, their solicitors, or agents, to inspect certain documents, it was held, that the defendant was justified in refusing to allow the inspection to take place in the presence of a co-defendant, although employed as an agent of the plaintiff. *Bartley v. Bartley*, 22 Law J. (N. S.) Chan. 47.

PUBLIC COMPANY.—*Transfer of shares—Lunatic*.—The plaintiff being possessed of shares in a public company, when in a state of extreme sickness transferred the shares into the name of the defendant; the plaintiff having recovered from his sickness, but having subsequently become lunatic, a bill was filed in his name, by his committee, to have the defendant declared a trustee of the shares: Held, that as the plaintiff had survived the sickness during which the transfer was made, the gift could not operate as a *donatio mortis causa*, and it appearing that the gift had been received by the defendant upon the distinct understanding that it was to be absolute only in the event of the death of the plaintiff: Held, that the defendant must be considered as trustee of the shares for the plaintiff. The bill contained charges of fraud, which were neither supported nor repelled by evidence; but inasmuch as the costs were not increased by such charges: Held, that the costs of the suit ought not to be affected thereby. *Staniland v. Willott*, 3 D. & S. 664.

RAILWAY.—1. *Abortive undertaking—Bill for account—Dismissal*.—A bill was filed in 1849, for the purpose of taking the accounts of an abortive railway undertaking. Upon a motion in July, 1851, by a defendant to dismiss the bill, the plaintiff undertook to file a replication on or before the first day of Hilary Term, 1852. He made default in performing his undertaking. Upon a motion made in February following, the plaintiff proved that he had been unable to serve the other defendants, so as to perfect the suit, which he was prosecuting *bonâ fide*: Held, that the plaintiff must be held to the undertaking, and that if he had a case entitling him to be relieved from that undertaking, he ought to have made a special

application to be discharged from it. Other defendants had abstained from moving for the dismissal of the bill, relying on the undertaking given on the motion in July, 1851; but on the default of the plaintiff to perform that undertaking by filing a replication, these defendants, in February, 1852, moved for the dismissal of the bill as against them, and the Court dismissed the bill accordingly. *La Mert v. Stanhope*, 5 D. & S. 247.

2. *Opposition to bill—Ropery—Alteration of level.*—Lessees of premises occupied by them as a ropery agreed to withdraw their opposition to a Bill in Parliament for a railway which would intersect the ropery. The agreement, among other stipulations, provided that the railway should be so constructed as that, when finished, the level of the ropery should not be altered, nor the surface of the ropery be in the least respect diminished: Held, that the railway company were bound to restore the surface, so as to be available for all purposes to which it might have been applied before the construction of the railway, and not for the purposes of a ropery only. *Harly v. The East and West India Docks and Birmingham Junction Railway Company*, 1 D. M. & G. 290.

RAILWAY ACT.—1. *Disqualified persons—Investment—Reference to Master.*—Land belonging to the vicarage was taken by a railway company, and the purchase-money paid into court, to the account of the vicar. On a petition by the vicar, stating an agreement to purchase land particularly mentioned in the agreement, and that the title had been approved of by a barrister, and that the title-deeds had been examined and found correct, and praying for a conveyance and payment of the money out of court, without a reference to the Master, the Court made the order. *Ex parte Vicar of East Dereham*, 21 Law J. (N. S.) Chan. 677.

2. *Purchase of lands.*—By a Railway Act a company was empowered to take lands belonging to a vicarage, and it was declared that the purchase-money should be paid into court, and that, on a petition by the vicar and patron, with the consent of the Ordinary of the diocese, it might be laid out in the purchase of other lands. A purchase was made accordingly: Held, that the bishop was entitled to be paid by the company, not only the cost of his attendance in the Master's office, but also of his appearance on the petition to the Court for a reference and confirmation of the Master's report. *Ex parte Vicar of Creech St. Michael*, 21 Law J. (N. S.) Chan. 677.

RAILWAY COMPANY.—1. *Agreement or undertaking in a cause—Act of Parliament.*—A railway company, defendants in a cause, entered into an agreement or undertaking with the plaintiff, not to do any act contrary to a then pending notice of motion, unless under the authority of Parliament, until the hearing of the cause or the further order of the Court. The company subsequently obtained an Act of Parliament, which did not by positive enactment, nor, in the opinion of the Court, by necessary conclusion from its provisions, take the case complained of by the plaintiff out of the reach of the

undertaking, although it did not prohibit the act, and might have contemplated the act consistently with the provisions of the Act of Parliament: Held, on motion by the plaintiff, that the undertaking was binding on the company, until the further order of the Court; but that the company, on showing merits, might have moved to discharge it, and the Court, deeming such merits to have been shown by the answer, accordingly discharged the undertaking. *Stevens v. The South Devon Railway Company*, 21 Law J. (N. S.) Chan. 816.

2. *Agreement by directors for interchangeable use—Contract—Negative agreement.*—Two directors of a railway company (the plaintiffs) met two directors of another railway company (the defendants), and entered into an arrangement in writing, signed by all four directors on behalf of their respective companies, whereby it was mutually agreed, that each of the companies should interchangeably use the railway of the other company on certain specified terms. The agreement contained no words of succession or of restriction: Held, that these contracts were not mere licenses determinable at will, but conferred rights of a permanent nature on the companies: Held also, that the terms of this contract were not too vague, but that the user conceded was one consistent with the proper enjoyment of the railway, the subject-matter of the contract, and with the rights of the granting party: Held also, that this Court will grant an injunction, restraining the defendants from acting contrary to a negative agreement, although it cannot specifically enforce the performance of the whole of the agreement. *The Great Northern Railway Company v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 5 D. & S. 188.

3. *Application to Parliament—Illegal contract—Exclusion of directors—Majority.*—Parliament having created a company, the power rests in Parliament to vary its constitution or to annihilate it, and it is not the function of a Court of Equity to decide on the propriety of an application to Parliament to vary the object contemplated by the Act. Such an application is not illegal, if it be pursued by legal means. But it appearing in a suit by certain shareholders, that a company had resolved to use its funds, and to pledge its credit, and to make contracts for the purpose of such an application to Parliament: Held, that such appropriation of funds and pledges and contracts were illegal, and at the instance of the shareholders, an injunction was granted, restraining the appropriation of funds, the pledging of the company's credit, and the entering into contracts in support of such an application to Parliament; but the Court declined to restrain the company from introducing or soliciting such bill, or using the name and seal of the company for those purposes. Certain of the directors of a railway company, acting on the nomination of another railway company, which was interested in certain shares in it, and which nominated those directors by virtue of the Act constituting the company, were excluded, by a resolution of the board of directors, from the meetings of the directors, and the majority delegated all the powers of the board to a managing com-

mittee: Held, that although in such a body the majority binds the minority, yet, that it is essential to the validity of their acts, that the voice of the minority should have been heard; and such exclusion of directors was restrained. A railway company was beneficially entitled to certain shares in another railway company, which, under the authority of the Act constituting the latter company, were vested in trustees for the former. The former company filed a bill against the directors and certain shareholders of the latter, and against the trustees of their own shares, complaining that certain dispositions of the trust-funds and contracts which were in contemplation were illegal, and praying for an account and relief against the directors, and an injunction to restrain such disposition of funds and contracts: Held, that as the equitable title of the plaintiffs was executed, they making their trustees defendants could sustain their suit, and were not precluded from suing by the provisions of the Companies Clauses' Consolidation Act, 1845, s. 20, which exonerates companies from seeing to the execution of any trusts affecting shares. *The Great Western Railway Company v. Rushout*, 5 D. & S. 290.

4. *Persons under disability—Money paid into court.*—Where money has been paid into court in respect of lands taken by a company from persons under disability, and, with the exception of a small surplus, has been afterwards laid out in the purchase of lands to be settled to the same uses, if such surplus is under 20*l.*, the Court will allow it to be paid to the tenant for life, but not otherwise. *Re Bateman's Estate*, 21 Law J. (N. S.) Chan. 691.

5. *Purchase—Payment of money into court—Corporation.*—A railway company, under pressure, paid the purchase-money for lands bought of a corporation to the vendors, instead of paying it into court, under the 8 & 9 Vict. c. 18, s. 69. Upon a bill filed by the former, the latter were, on motion, ordered to pay into court the purchase-money in their hands for the purpose of interim protection. *London and North-Western Railway Company v. The Corporation of Lancaster*, 15 Beavan, 22.

6. *Purchase-money—Payment into Bank of England—Interest—Agreement—Constitution—Costs.*—By agreement in 1847, a railway company took possession of certain lands required for their undertaking, and stipulated to pay the price awarded by arbitration to the owner, or into the Court of Chancery, and interest in the mean time from the delivery of his abstract until the day on which the purchase should be completed. In 1849 the company paid the purchase-money into the Bank of England, under the provisions of the Lands Clauses' Consolidation Act, and received from the solicitors of the vendors an account for interest up to that time. This account was mislaid, and another account was in 1851 sent to the company at their request, in which the interest was brought down to the latter period. No application had been made by the vendor for the investment of the money paid in by the company: Held, on special case between the vendor and the company, that the interest ceased to run from the time of payment of the purchase-money into the Bank

of England. The Court, considering there had been great delay on the part of the company in paying the purchase-money, gave them no costs of the application. *Lewis v. South Wales Railway Company*, 22 Law J. (N. S.) Chan. 209.

7. *Specific performance—Contract for purchase—Tenant for life—Lands clauses' consolidation act.*—The Eastern Counties Railway Company having a Bill before Parliament for enabling them to make a railway from W. to S., entered into an absolute agreement with A., a landowner on the proposed line, in consideration of his withdrawing his opposition to the Bill, to purchase a house and six acres of land which stood settled on A. for life, with remainders over, for the price of 8,000*l.*, and 5,000*l.* additional, by way of compensation, and undertook to obtain all such powers, and to do all such acts as would enable A. to sell the estate. The Bill was passed containing no special powers as to A.'s estate, but the company, under their compulsory powers, could have taken two acres of the estate as within their line of deviation. No funds were raised under the Act, and no part of the line was commenced. The company having totally abandoned the line, sent a notice to A. that they should not require his estate. Upon a bill filed by A. against the company, before their compulsory powers had expired, it was held that the company were bound specifically to perform their contract. The case of *Webb v. The Direct London and Portsmouth Railway Company*, is to be explained on the ground of the uncertainty of the contract. An existing railway corporation duly authorized, promoted a Bill in Parliament for extending their line, and entered into an onerous contract with a landowner in furtherance of the objects to be carried out by their Bill. The Act passed, but no money was raised under it, and the scheme utterly failed: Held, that it was no objection to enforcing specific performance, that it would involve the payment of the purchase-money out of the general funds of the company, and so would work hardship upon the shareholders, who had no notice of the arrangement, for the Court could not recognise the rights of individual members as distinct from the rights and liabilities of the corporation itself. *Hawkes v. Eastern Counties Railway Company*, 22 Law J. (N. S.) Chan. 77.

8. *Tenant for life—Notice—Payment of purchase-money—Interest—Payment into banker's.*—A railway company gave the usual notice to a tenant for life, of settled estates, that they required a portion of the estates for their line, and afterwards made an offer for the fee-simple. The solicitor of the tenant for life accepted the offer, stipulating that interest at 5*l.* per cent. should be paid from the time of the company taking possession, and proposing that as the title was well known, the company should be satisfied without the production of the deeds. To this the company objected, and proposed to pay the money into a banker's, in the names of the respective solicitors pending the investigation of the title. The tenant for life's solicitor thereupon suggested that as the money must be paid into court, it had better be so at once. The company thereupon

paid the money into court to the account of the Railway Act only, and communicated to the tenant for life's solicitor, that they had paid the money into court under the 69th section of the Lands Clauses' Consolidation Act. The solicitor for the tenant for life thereupon reminded them that interest at 5l. per cent. would continue to be payable till the purchase was completed. To this the company's solicitor returned no answer, and although several other communications passed between the solicitors respecting the purchase, the company's solicitor did not, till a year afterwards, express any objection to the payment of interest. The money remained uninvested during that period: Held, that the company had acquiesced in the vendor's view of the case, and were bound to pay interest up to the investment. *Ex parte the Earl of Hardwicke, re The Royston and Hitchin Railway Company's Act, 1846*, 1 D. M. & G. 297.

REAL ESTATE. See ADMINISTRATION SUIT.

RECEIVER.—1. *Banker's liability—Separate accounts.*—The plaintiff being owner of an estate, employed an agent and receiver, who paid into the defendant's bank the rents of the estate, to an account headed with the name of the estate, to distinguish it from his private account. The receiver's private account being overdrawn, he transferred the balance of the estate account to make up the deficiency due upon his private account. Upon a bill filed by the plaintiff against the bankers, to refund this balance so transferred, it was held that, according to the principles of a Court of Equity, a person who deals with another, knowing him to have in his hands or under his control, moneys belonging to a third person, must not enter into a transaction with him, the effect of which is that a fraud is committed on the third person; and it appearing upon the evidence that the bankers were aware that the money was the produce of the rents of the plaintiff's estate, a decree was made against the bankers for repayment of the amount. *Bodenham v. Hoskins*, 21 Law J. (N. S.) Chan. 864.

2. *Mortgagee in possession—Third mortgages.*—Motion for receiver against a mortgagee in possession, granted after decree on the application of another mortgagee, a co-defendant. A. B., the third mortgagee, took possession, and then bought up the first mortgagee. Having retained possession many years, and received a considerable sum, a receiver was appointed against him on the application of the second mortgagee, the affidavit of A. B. not satisfactorily showing that anything remained due on the first mortgage. *Hiles v. Moore*, 15 Beavan, 175.

REDEMPTION. See MORTGAGE.

SALE.—1. *Conditions of—Interest on purchase-money—Sale of a reversion.*—Real estate, including property in possession and in reversion, was put up for sale by auction in lots, under a condition that the vendors should confirm the Master's report of purchases on

or before the 25th of December, 1849, and that on or before that day each purchaser should pay his purchase-money into court, and be entitled to the rents of his lot from that day, and that if, from any cause whatever, the purchase-money should not be so paid, he should pay interest on it at 5l. per cent. from that day. A. purchased a reversion in fee, being one of the lots. Through the default of the vendors, the Master's report was not confirmed until August, 1851. Motion, that A. should pay his purchase-money into court, with interest from the 25th of December, 1849: Held, that interest was payable from that day at 4l. per cent. *Wallis v. Sarel*, 21 Law J. (N. S.) Chan. 717.

2. *Trustee—Receipt for purchase-money—Specific performance.*—On a sale by a trustee, he stipulated that his receipt should be deemed an effectual and conclusive discharge, and that the purchaser should not require the concurrence of the heir or *cestui que trust*. A decree was made for specific performance and reference as to title. The Master found in favour of the trustee, and upon exceptions, the purchaser contended that the rule as to the concurrence of the *cestuis que trust*, being one for their protection, it was a breach of trust to stipulate that they should not concur; but the Court held the point concluded by the decree. The rule that the costs of a suit for specific performance depend upon when the title was first shown, is to be strictly adhered to. *Wilkinson v. Hartley*, 15 Beavan, 183.

SALE BY ACTING EXECUTORS.—*Powers—Disclaimers.*—A testator devised his freehold estates to A., B., C., and D. and their heirs, on the usual trusts for sale. He then ordered and directed that A., B., C., D., the executors of that his will, or the survivors or survivor of them, or the executors or administrators of such survivor, should sell his copyhold estates. He then gave all his personal estate to the same persons, and declared the trusts of all the moneys to arise from his real and personal estate. A. died in the lifetime of the testator. The testator died in 1830. B. and C. sold the copyhold estates in 1832. In 1851 D. executed the usual deed of disclaimer. There was no evidence that D. had refused to accept the executorship before the sale in 1832: Held, first, that copyholds were within the 21 Henry 8, c. 4; and secondly, that under that Act the sale of the copyholds had been properly made by B. and C. *Peppercorn v. Wayman*, 21 Law J. (N. S.) Chan. 827.

SEPARATE USE. See FEME COVERT, 3.

SETTLEMENT.—1. *Construction—Estate for life upon condition.*—By a post-nuptial settlement 4,000l. were vested in trustees upon trust to invest and to pay the income to the husband and wife for their joint lives, and then to the survivor for life; and after the death of either, to stand possessed of one moiety of the trust fund for the survivor absolutely, and of the other moiety for the children of the marriage as the parents should jointly appoint, and in default of such appointment, for the children in equal shares, with powers of advancement; and it was hereby declared that the income of the trust moneys

was made payable to the parents and the survivor of them, upon the condition only that they and the survivor of them should during the minority of the children provide them with suitable diet, clothing, maintenance, and support, in proportion to the circumstances and condition in life of the parents and the expectancies of such child or children; but that in case of an advance to any of the children, the parents or the survivor should be released from the condition. In 1844 the husband petitioned the Court of Bankruptcy, and under the 5 & 6 Vict. c. 116, a conditional order was made for his protection, upon payment of a yearly sum. In 1845 the husband and wife assigned by way of mortgage all their interest in the income and capital of the trust fund. The fund was then transferred into court under the Trustees' Relief Act. On petition by the six infant children, stating that their parents were in embarrassed circumstances and had for some time past omitted to provide them with suitable diet, &c. (following the words of the deed), and that no advance had been made to them or any of them, and it appearing that the parents were in a respectable station in life and in no business, the Court ordered the whole income to be applied for the maintenance of the petitioners. *Quære*, the effect of a conditional order for protection under the 5 & 6 Vict. c. 116, as to vesting the assets of the insolvent in the official assignee. *Re Dalton's Settlement*, 21 Law J. (N. S.) Chan. 681.

2. *Jointure*.—By a settlement made on the marriage of an adult female, it was declared that, in consideration of the intended marriage and for providing a competent jointure and provision of maintenance for the wife and issue of the marriage, the father of the husband had paid him 3,000*l.*, and that the husband had given a bond for the payment of 2,000*l.* six months after the marriage, to be settled on trusts for the benefit of himself, his wife, and the issue of the marriage. During the coverture, the husband bought certain lands, which he subsequently sold to a purchaser, from whose devisees the defendant purchased with notice of settlement. The husband died without satisfying the bond. On a bill by the wife for dower out of the lands so sold: Held, that her right was barred by the settlement, and that she had no lien on or right to resort to the lands for the satisfaction of the amount due on the bond. *Dyke v. Rendall*, 2 D. M. & G. 209.

3. *Limitation of estate—Entail—Recovery*.—By indenture of settlement, two estates, A. and B., were limited to the father for life, and subject thereto, the estate A. was limited to the first and other sons in tail male, and the estate B. was limited to the second and other sons in like manner; and it was provided, that if the second son should become an eldest son and as such should become entitled to the actual possession or to the receipt of the rents and profits of the estate A., the limitations of the estate B. should cease and determine as if such second son were dead without issue. The second son, by the death of his eldest brother, became the eldest son, and joined his father in suffering a recovery of the estate A., the uses of which

were declared to the joint appointment of the father and son, and subject thereto, to the old uses. In exercise of this power, the father and son, by a mortgage in fee of the estate A., raised a sum of money, which was paid to the father and son: Held, that on the death of the father the estate B. shifted from the second son, under the terms of the proviso contained in the settlement: Held also, that the recovery suffered by the father and son did not by itself prevent the operation of the proviso, and that the mortgage had not that effect; but that, notwithstanding both the recovery and the mortgage, the second son came on the death of his father into possession of the estate A. within the meaning of the terms of the settlement: Held also, that the party entitled to the estate A. might, previously to the happening of the event mentioned in the proviso, have so exercised his rights over the estate as to have prevented it from ever coming into the possession of the second son within the meaning of the terms of the settlement. The decisions in the cases of *Fazerkerly v. Ford*, 4 Sim. 390, and *Taylor v. Earl of Harewood*, 3 Hare, 372, approved of. *Harrison v. Round*, 2 D. M. & G. 190.

4. *Power of appointment—Residuary gift.*—A testatrix having a power of appointing a sum of 10,000*l.* secured by a term of five hundred years, and having also a power of appointing the fee of lands on which the money was secured, by her will devised her lands to A. for life, with remainder to B. in tail, and gave to A. all the residue of her personal estate: Held, that the 10,000*l.* passed under the residuary gift of the personal estate. Effect of a general release by a party entitled to a charge on real estate secured by a term of years to the trustees of the term, the term itself not being assigned or merged. *Clifford v. Clifford*, 9 Hare, 675.

SHIP AND SHIPPING.—1. *Jurisdiction—Agreement.*—Where part-owners of a ship differ on the terms of an agreement to manage and charter the vessel, the construction of such agreement is within the province of a Court of Equity, and the question of its concurrent jurisdiction with the Court of Admiralty cannot be raised. *Darby v. Baines*, 21 Law J. (N. S.) Chan. 801.

2. *Registry—Mortgage—Freight.*—A ship belonged to A. and B. in different shares, and they were registered as the owners of it, at the port of Liverpool. In April, 1849, the ship sailed from Liverpool to Sidney. In October, A. executed a power of attorney, authorizing B. to sell his shares. In November, A. mortgaged his shares in the ship and freight to C., and the deed of mortgage was registered at Liverpool. In March, 1850, B. being in Sidney (acting under the power of attorney as to A.'s shares), sold the ship to D. On this occasion the old certificate of registry was given up, and the ship was registered *de novo*, in D.'s name, at Sidney. The ship, with a cargo, was put into the London Docks in February, 1851, and both C. and D. took possession of it, by each of them putting a man on board. Upon the question as to the rights of C. and D. in the ship and

freight: Held, that C. was entitled to A.'s share in the ship and freight. *Cato v. Irving*, 21 Law J. (N. S.) Chan. 675.

SIMPLE CONTRACT AND SPECIALTY DEBTS.—*Bond creditors.*—An assignment of property was executed to trustees for the benefit of creditors, who were to be paid equally; and it was stipulated that any securities held by creditors might be realized and applied towards payment of their debts; and as to any deficiency, such creditors were to stand *pari passu* with the others, but not to receive more than the principal and interest. A schedule was added containing the debts, calculated with the interest up to the date of the deed, but there was no express contract that simple contract debts should carry interest: Held, upon exceptions to the Master's report, that this did not convert the simple contract debts into specialty debts, and no right to interest after the deed was created, which did not otherwise exist: Held also, that bond creditors were only entitled to prove for the amount of the penalties in their bonds. *Clowes v. Waters*, 21 Law J. (N. S.) Chan. 840.

SPECIFIC PERFORMANCE.—1. *Contract for sale of ship.*—A Court of Equity will not enforce specific performance of a contract for the sale of a ship or part of a ship. By the 34th section of the statute 8 & 9 Vict. c. 89 (the Ship Registry Act), every sale or transfer of a ship, or part of a ship, must be registered; and a Court of Equity must construe the section to extend to any contract for sale, or contract to transfer. Whether, under this statute, an action could be maintained on a contract for sale of a ship or part of a ship, *quære*. *Hughes v. Morris*, 21 Law J. (N. S.) Chan. 761.

2. *Laches—Agreement for lease—Landlord and tenant.*—A strong case is required to induce the Court to refuse specific performance of an agreement for a lease by a landlord, on the ground that the tenant and proposed lessee has not adhered to the conditions which would be the subject of covenant on his part in the lease; but where a tenant, contrary to the terms of the draft lease, has neglected to insure for eleven years, has allowed the premises to go out of repair yearly for four years, and has refused to permit the lessor or his agents to enter and view the condition of the premises after notice to repair, the Court will not, on bill filed by the tenant, after notice to quit has been given by the landlord, enforce specific performance of an agreement for a lease, notwithstanding a large sum of money has been laid out according to the agreement, and the premises occupied for upwards of thirty years under the agreement. *Gregory v. Wilson*, 22 Law J. (N. S.) Chan. 159.

3. *Purchase by a solicitor from his client—Infant.*—Bill by a solicitor against his client for specific performance of a contract for sale by auction, dismissed with costs, the purchase being made by the solicitor (who had the conduct of the sale) whilst his client was a minor, and the sale not having been conducted with due regard to the interests of the client or the protection of the estate. The solicitor of the vendor bidding in person at the sale on his own

behalf, is bound to state that fact publicly, in order to exclude the inference that he is bidding on behalf of the estate. A reserved bidding is proper in the case of a sale of an infant's estate; but where there is no reserved bidding, that fact should be publicly stated. *Cutts v. Salmon*, 21 Law J. (N. S.) Chan. 750.

4. *Statute of Frauds—Procedure Amendment Act.*—A. filed a claim for specific performance of a contract by B., C., and D., stating in his claim that the defendants had by an agreement in writing, contracted to demise a house to A., for a certain term, at a stated rent, and that the plaintiff A. had agreed by parol at the same time to pay to the defendant a premium of 200*l.* The claim prayed that the defendants might grant a lease, the plaintiff offering to pay the premium according to the parol agreement: Held, on appeal, overruling the decision of the Court below, that the Statute of Frauds did not present an obstacle to specific performance, if there were no fraud. The defendant, at the hearing, alleging that the agreement was obtained by the plaintiff from one by fraud, and from another by fraudulent misrepresentation, the cause was ordered to stand over, that an oral examination of witnesses might take place under the provisions of the statute 15 & 16 Vict. c. 86; and such examinations having taken place, upon which the allegations of fraud and fraudulent misrepresentation failed, the Court decreed specific performance. Where persons sign a written agreement, and there has been no circumvention or fraud, or mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision be agreed to which has not been inserted in the document, if the party who should perform the omitted term consents to the performance of it. *Martin v. Pycroft*, 22 Law J. (N. S.) Chan. 94. And see AGREEMENT.

STATUTES.—*Construction—Land-tax Redemption Acts—Vendor and purchaser—Sale by prebendary to trustee.*—A prebendary sold to a trustee for himself, in 1808, certain prebendal property, for the redemption of the land-tax. The lords commissioners and other necessary persons were parties to the sale. The succeeding prebendary did not question the transaction, but his successor, who was appointed in 1833, and had ever since been in the receipt of the annual amount of land-tax, which had been redeemed, filed a bill in 1848 to set aside the sale, on the ground of illegality, irregularity, and fraud: Held, first, that such property was saleable under the provisions of the Land-tax Redemption Acts; secondly, that the selling prebendary might purchase the property for himself; and thirdly, fraud not being proved, the prebendary not being a direct trustee of the property for his successors, and forty years having elapsed since the transaction, impeachable (if at all) at its inception, that the bill ought to be dismissed with costs. *Beaumont v. King*, 22 Law J. (N. S.) Chan. 111.

STATUTE OF LIMITATIONS.—*Banker's deposit-note.*—R. B. deposited 110*l.* with Messrs. H. B. L., C. F., E. L., and C. S. F.,

bankers, upon a deposit-note payable twenty days after sight. In June, 1838, H. B. L. died, having by his will devised his real and personal estate to trustees, one of whom was his son H. L., upon trust to raise money to pay his debts, &c., and subject thereto, upon trust for H. L., whom he appointed sole executor. H. L. was admitted a partner in the bank. In 1835 E. L. died, and in 1843 C. F. died. C. S. F. and H. L. continued the business, but became bankrupts in 1847. R. B. from the death of H. B. L. received interest at the bank upon his deposit-note until the bankruptcy, when he proved his debt against the bankrupt's estate, and on a bill filed to make the real and personal estate of H. B. L. liable to the payment of the 110*l.*: Held, that the interest was not paid by the continuing partners as agents of H. B. L., the testator; that no agency could be implied; that the interest was paid on account of the firm; that all claim against the real and personal estate was barred by the Statute of Limitations in six years; that R. B. had accepted the surviving partners as his debtors; and the devise made by H. B. L. for payment of debts was satisfied: and the bill was dismissed with costs. *Brown v. Gordon*, 22 Law J. (N. S.) Chan. 65.

STAY OF PROCEEDINGS.—*Costs—Bill—Dismissal.*—A new next friend of a *feme covert* having been substituted, the old next friend, who was a defendant to the suit, was ordered to give security for costs up to the time of his appointment, and proceedings were stayed in the mean time. No security having been given, it was asked that, in default of its being completed within a limited time, the bill might be dismissed with costs; but the application was refused. *Payne v. Little*, 21 Law J. (N. S.) Chan. 718.

TENANT FOR LIFE WITHOUT IMPEACHMENT OF WASTE.—*Power to cut timber.*—Family estates which were subject to mortgages were conveyed to trustees to raise money for the payment of incumbrances, and subject thereto for A. B. for life, and then for C. D., his eldest son, for life, without impeachment of waste, but subject to a power to the trustees after contained, with an ultimate remainder to A. B. in fee-simple. The power to the trustees was during the life of A. B. and after his death, with the consent of C. D., if he should be the survivor, to fell timber and apply the proceeds towards paying off incumbrances so long as they should exist: Held, that the power was paramount to any authority in the tenant for life, without impeachment of waste, and that it was not an infringement on the law of perpetuity. *Briggs v. The Earl of Oxford*, 21 Law J. (N. S.) Chan. 829.

TERM OF YEARS.—*Trust estate—Mortgage—Foreclosure.*—Certain tenements were, upon a loan of 200*l.*, assigned by the owner to the lender for a long term of years, upon trust to sell, and out of the proceeds, first, to pay the costs of sale; secondly, to pay the 200*l.* and interest; and thirdly, to pay the surplus to the owner. The deed contained a covenant by the owner to pay the lender the 200*l.* and interest at the end of six months, and also absolute covenants by the

owner for title as upon a mortgage and for quiet enjoyment by the lender after default. Upon a bill to foreclose the equity of redemption in the form No. 6 of schedule A, to the orders of April, 1850: Held, that the case was one for a sale and not for a foreclosure. *Jenkin v. Row*, 5 D. & S. 107.

THELLUSSON ACT.—*Portions to children.*—By a marriage settlement dated in 1823, certain family estates at B., of which Lord B. was tenant for life in remainder, were limited to uses for raising 40,000*l.* as portions for the younger children of Lord B., to be payable and divided among such children as Lord B. should appoint, and in default of appointment, equally to be divided among them; and payable at the decease of Lord B., or during the lifetime of Lord B. with his consent. The bishop of D., the great uncle of Lord B., by his will dated in 1825, reciting the settlement of 1823, bequeathed 15,000*l.* to trustees upon trust to accumulate the same during the life of Lord B., or for such further period as should make up the space of twenty years from the testator's death, in order by means of the accumulated funds to exonerate the family estate of B. from the charge of 40,000*l.*, with a proviso that if, before the expiration of the period of accumulation, the accumulated fund should be of sufficient amount for answering the purpose aforesaid, then the accumulation should thereupon immediately cease. The testator then gave certain chattels to go as heirlooms with the settled estates, and bequeathed 30,000*l.* for building a mansion-house upon the same. The testator died in 1826. In 1847 being twenty-one years after the testator's death, the accumulated fund amounted only to 35,000*l.*, but at the time of the institution of the suit it amounted to 43,000*l.*: Held, upon appeal, reversing the decision of the Court below, that as Lord B. took an interest under the will, the directions for accumulation were within the 2nd section of the 39 & 40 Geo. 3, c. 98, and valid for the whole period of Lord B.'s life. To bring a case within the exception of the 2nd section, it is not necessary that the parent should take an interest in the estate or fund out of which the accumulations are directed, but it is sufficient that he take an interest generally under the instrument directing the accumulations. *Seemle*, the exception in the 2nd section as to accumulation for payment of debts is to be construed as extending to the payment of the debts of a stranger as well as to the debts of the grantor, settlor, or devisor, directing the accumulation. *Lord Barrington v. Liddell*, 22 Law J. (N. S.) Chan. 1.

TITHES.—1. *Composition.*—A rector of a parish in the city of London received for some years, without objection, a fixed sum by way of tithes of particular premises, and then filed his bill for an account: Held, that the receipt of such fixed sum, though less than the annual value, did not necessarily imply a composition, and that much stronger evidence would be required to establish such payment as a composition than in the ordinary case of a money payment in lieu of tithes in kind. *Quere*, whether the rule requiring six months' notice for determining an ordinary composition for tithes in

kind is applicable to the case of a composition for a money payment in lieu of tithes. Form of reference to the Master to take an account of tithes due under the 37 Hen. 8, c. 12, whether the rent or annual value of the buildings and premises is increased by means of implements or fittings, not titheable, let or used therewith. *Letts v. London Corn Exchange Company*, 21 Law J. (N. S.) Chan. 684.

2. *Disputed title—Quaker—Proceedings in Chancery—Dismissal.*—A bill was filed by a tithe-owner, claiming tithes against several occupiers of land, who had not rendered any tithe, and disputed the plaintiff's title to it. One of the defendants was a Quaker, and applied to the plaintiff on that ground to dismiss the bill against him, which the plaintiff consented to do, provided the Quaker's answer admitted the actual title of the plaintiff, so as to enable the plaintiff to obtain his tithes against the Quaker by the ordinary proceedings before justices in the country. The draft of the Quaker's proposed answer was then shown to the plaintiff, and was by arrangement altered so as not to deny the plaintiff's title, but so as to object merely on the grounds of religious scruple entertained by him as a Quaker. On this answer being produced in evidence, the plaintiff recovered his tithes before the justices, and the further prosecution of the suit against the Quaker became unnecessary. On motion by the plaintiff, the suit was dismissed against the Quaker defendant; but as it appeared upon the affidavits, and the draft of the answer as originally prepared, that the defendant had previously to and at the time when the bill was filed disputed the plaintiff's title, the bill was dismissed without costs of the suit or of the motion. *Wright v. Barlow*, 5 D. & S. 43.

TRUST.—1. *Breach of—Annual rests—Costs—Compromise—Letters.*—A trustee of a marriage-settlement who allowed a sum of 350*l.* to remain in the hands of a trading firm for a period exceeding fifteen years after the death of the tenant for life, but who eventually and before the bill was filed, paid the principal, with five per cent. interest: Held, liable to account with annual rests, and also to the costs of the suit. The Court will discountenance all attempts to convert offers of compromise by letter into admissions prejudicial to the parties using them. Observations as to the limited purpose for which such letters may be used. *Jones v. Foxall*, 21 Law J. (N. S.) Chan. 725.

2. *Trust-fund—Tenant for life—Breach of trust.*—Trustees are liable for not taking proper steps to get the trust-fund transferred into their names. Tenant for life, who had obtained the benefit of a breach of trust, made responsible upon a bill for that purpose, instituted by the trustees. Two classes of trustees had committed a breach of trust: Held, that the *cestuis que trust* might proceed against the one class, making the other class parties. *McGarben v. Dew*, 15 Beavan, 84.

TRUSTEE ACT, 1850.—1. *Railway company.*—A petition under the Trustee Act, 1850, stated that A. had mortgaged lands to B. in

fee; that B. had died, having by his will devised the lands to infants, and appointed C. his executor; that a contract had been entered into by C. with a railway company for the sale of a part of the lands at a certain price; and for the purpose of carrying out the contract, it was necessary to get in the legal estate. The petition prayed that the legal estate might be vested in C., and that the railway company might pay the costs of the petition. The railway company appeared at the hearing, but objected to pay the costs: Held, that the Court had no jurisdiction to make an order either in favour of or against the company. *Re Rees's Devises*, 21 Law J. (N. S.) Chan. 687.

2. *Right to transfer—Executrix—Married woman.*—A testator bequeathed property to A. and B. equally, and appointed an executor and an executrix. The executrix married, and the property was laid out in stock, in the names of the executor and executrix, "the wife of C." C., the husband, in 1839, went abroad, and had down to 1852 never been heard of, and was not known whether to be alive or dead. A. attained twenty-one, and he and the executor and executrix petitioned under the stat. 13 & 14 Vict. c. 60, for a declaration that C. was a trustee within the meaning of the Act, and a direction that the right to transfer was vested in the executor and executrix and an official of the Bank, and that half the fund might be transferred by them into the name of A.: the Court declared C. to be a trustee, and that the right to transfer was vested in the executor alone. *Ex parte Bradshaw, re Dennison's Trust*, 22 Law J. (N. S.) Chan. 181.

3. *Vesting order—New trustees.*—In cases where new trustees are appointed under the Trustee Act, 1850, the real estates, subject to the trust, ought to be conveyed to them by deed, and the vesting order ought only to be resorted to when it is inconvenient to obtain a conveyance. *Langhorn v. Langhorn*, 21 Law J. (N. S.) Chan. 860.

And see BANKING COMPANY.

VENDOR AND PURCHASER.—1. *Conditions of sale—Lessor's title.*—Leasehold property put up for sale, with the condition that the lessor's title would not be shown, and should not be inquired into. In the inquiry, as to the title in a reference to the Master, the purchaser showed that the lessors were a canal company, and that the company had under their Act the power of selling the property, but not the power of leasing it: Held, that the purchaser was precluded by the conditions of sale from taking that objection to the title. *Hume v. Bentley*, 21 Law J. (N. S.) Chan. 760.

2. *Specific performance—Sub-purchaser.*—A. signed the usual agreement for purchase at an auction, and also a memorandum that he had purchased as trustee for B., who was present, and paid the deposit. The abstract of title was sent to a solicitor, but whether he acted for A. or B., or both, was disputed, and was afterwards sent by the vendors to B.'s solicitor. On bill filed by the vendors against A. and B., for specific performance, A. stated as above, but B. stated

that he had bought the property as sub-purchaser from B.: Held, that the contract having been entered into by the vendors with A., the bill must be dismissed as against B., but that A. was not bound by any communication or proceeding which had taken place as to the title or otherwise between the vendors and B. *Chadwick v. Maden*, 21 Law J. (N. S.) Chan. 876.

3. *Same—Lessee and leasehold auctioneer—Puffer.*—A purchaser cannot refuse to perform a contract to purchase leaseholds, because the lessee or covenantor is unknown, if the tenants regularly pay the rent according to the lease. A vendor may be his own auctioneer, and may, unknown to the bidders, employ a person to bid progressively up to a reserved price. Every objection to title or contract must be immediately notified by the purchaser, on becoming acquainted with it, otherwise it will be deemed to have been waived. *Flint v. Woodin*, 22 Law J. (N. S.) Chan. 92.

4. *Sale of reversion—Public auction—Interest in leaseholds—Local circumstances.*—If, previously to the sale of a reversionary interest, the vendor and purchaser concur in ascertaining from persons of competent skill, and having knowledge of the property and of all the circumstances likely to influence its value, a well-considered estimate of what the property would be likely to fetch at a sale, and act on that opinion: *Semble*, that such a transaction would not be afterwards disturbed, merely because other surveyors afterwards came to a different conclusion from that on which the parties acted. It is not necessary, to give validity to such a sale, that it should be made by public auction. But where upon the sale by private contract of such an interest in leaseholds, nothing was done except obtaining the opinion of an actuary unacquainted with the local circumstances likely to influence the value, and in a suit to impeach the sale the purchaser was unable to show that he had given the full value, the sale was set aside. *Edwards v. Burt*, 2 D. M. & G. 55.

5. *Same—Reference as to title—Costs.*—A. entered into a written contract for the sale of an estate to B. B. declined to perform the contract, on the ground of inadequacy of value. In a suit by A. against B. for a specific performance, by a decree dated in April, 1851, it was declared that A. was entitled to a specific performance of the agreement, and a reference was made to the Master to inquire whether A. could make a good title, and if so, to state when such good title was made, and that it was first shown in April, 1852: Held, that A. was entitled to the costs of the reference to the Master. *Abbot v. Swoorder*, 22 Law J. (N. S.) Chan. 235.

And see ANNUITY.

VOLUNTARY SETTLEMENT.—1. *Legal owner—Declaration of trust.*—The Court, in order to give effect to voluntary settlements, requires, where the settlor is the owner, everything to have been done which is requisite to transfer the legal ownership, and where he is the equitable owner, clear and distinct evidence of a declaration of trust in favour of the donee. A father being entitled during the

life of his son to the dividends on funds, standing in the names of himself and three other trustees, directed two of the trustees to pay over the dividends for the future to his son. They acted on the direction, and the testator afterwards recognised the gift: Held, that there was a valid and effectual voluntary settlement which this Court would give effect to. *Bentley v. Mackay*, 15 Beavan, 12.

2. *Trustees and cestuis que trust—Deed—Acts ultra trust—Notice.*—J. L. B. being entitled under the will of his uncle to real and personal estate, a portion of which consisted of shares in the General Mining Association, Regent's Canal shares, Columbian bonds, Consols, and cash at the banker's, executed a voluntary settlement for the benefit of himself for life, with remainder for his children. Upon a suit by him, asking that the deed might be declared void: Held, that no legal estate passed to the trustees of the settlement, and that it did not create any declaration of trust, as the trustees of the will were not parties to the deed; but as the shares in the General Mining Association and the Regent's Canal shares had been transferred to the trustees of the settlement, the transfer was complete, and the bill was dismissed as to these, but that the deed did not affect the real estate; and as no complete transfer of the Columbian bonds, and 12,694*l.* Consols, and 475*l.* 10*s.* 6*d.* cash, which were standing in the names of the trustees of the will, had been made, they were unaffected by the deed, and the trustees of the will were directed to transfer them to the plaintiff, but the costs of all parties to the suit were to be paid by the plaintiff. *Bridge v. Bridge*, 22 Law J. (N. S.) Chan. 189.

3. *Wife's estate—27 Eliz. c. 4—Husband's creditors.*—A *feme covert* being seized of an estate in fee, joined with her husband in conveying it to trustees, for the benefit of her husband, herself, and children, of whom there were several. The husband and wife subsequently joined in mortgaging the estate to secure 2,500*l.*, and after that they joined in conveying the estate to trustees upon trust to sell and divide the proceeds among the creditors of the husband. All the deeds were acknowledged by the wife, but the last two were executed without the intervention of the trustees of the settlement. The trustees of the last deed sold the estate for the benefit of the creditors, but the purchaser objected to the title, and upon a claim for specific performance: Held, that the settlement was voluntary under the 27 Eliz. c. 4, and void against a purchaser for valuable consideration. *Butterfield v. Heath*, 22 Law J. (N. S.) Chan. 270.

WATERWORKS.—*Extension—Waterworks Clauses Act, 1847—Possession of land—Ejectment.*—The defendants, the owners of certain waterworks, solicited a Bill in Parliament to empower them to extend their works, by constructing a reservoir upon the lands of the plaintiff and others. The plaintiff petitioned against the Bill, but upon an agreement that the value of the land and the amount of all compensation should be settled by arbitration, and that the defendants should fix the exact quantity of the plaintiff's land re-

quired, within six months after the Bill should have passed, he withdrew his opposition, and the Bill became an Act. The Act incorporated a former special Act, and the Lands Clauses' Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, and empowered the defendants to take certain parts of the plaintiff's lands, according to the deposited plans and books of reference. Prior to the expiration of the six months after the Act had passed, the defendants gave the plaintiff notice, specifying the portions of his land that would be required according to the boundaries in the plan and book of reference. The arbitration proceeded, and after the expiration of the six months, the plaintiff pointing out on the arbitration the inaccuracy in the boundaries, which attributed to the plaintiff's land less in admeasurement than he possessed, the arbitrator made his award, giving compensation for land described according to the plan and book of reference only; but it was in dispute whether he had included in his assessment of value the two roods and five perches which the plaintiff claimed beyond the admeasurement of the land comprised in the plans and book of reference. The defendants paid the amount awarded to the plaintiff. The defendants had made a statutory conveyance to themselves by deed-poll, describing the land according to the inaccurate plan and book of reference. They took possession of the land. The plaintiff recovered the two roods and five perches in an action of ejectment against the defendants. The defendants then proceeded, within six months after a motion for a new trial, made by themselves, had been refused, under the 124th section of the Lands Clauses' Consolidation Act, 1845, to issue their warrant to the sheriff to summon a jury to ascertain the value of the land and obtain the compulsory purchase of it from the plaintiff. The bill was for an injunction according to the prayer of the bill: Held, that the defendants had to proceed under the 124th section of the Lands Clauses' Consolidation Act, 1845; that the agreement with the plaintiff previous to the Act did not control that right; and that, in proceeding within six months after the refusal by the Court to grant a new trial in ejectment, the defendants were within the six months after the right had been finally established at law, and the Court refused the motion. *Hyde v. The Mayor, Aldermen, and Burgesses of the Borough of Manchester*, 5 D. & S. 249.

WILL.—1. *Appointment of trustees—Death of trustee in lifetime of testatrix.*—A testatrix gave real and personal property to trustees, with a proviso that if the trustees thereby appointed should die or decline to act, it should be lawful for the then surviving or continuing trustee, or if there should be no surviving or continuing trustee, then for the trustee so declining to act, by deed to substitute or appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or declining to act. One of the two trustees died in the lifetime of the testatrix, the other surviving her, and by deed disclaimed the trusts, except the power of nominating other persons to be trustees; and by the same deed he

appointed two persons to be trustees in the place of the trustee who had died before the testatrix, and of himself: Held, that the power had been properly executed: Held also, that this Court has no power under the Trustee Act, 1850, to appoint trustees where there are trustees *de facto* acting as such. *Ex parte Hadley*, 5 D. & S. 67.

2. *Bequest to children—Posthumous child—Cumulative legacies.*—Bequest of 500*l.* each to the four children of his niece A. B., *nominatim*, followed by a like gift to each of the children that may be born to any nephew or niece: Held, not to include a fifth child of A. B. born at the date of, but not named in, the will: Held also, on the same will, by Sir John Leach, that a child born after the testator's death was not entitled; and by Sir J. L. Knight Bruce, that the four children did not take cumulative legacies. *Early v. Middleton*, 14 Beavan, 453.

3. *Bequest of annuity to trustee—Appropriation of fund to meet annuity—Lien on annuity for breach of trust.*—A testator directed three trustees to raise a fund sufficient to pay an annuity to one of them, and gave power to resort to the residue, if the fund should become deficient. The three trustees invested more than enough on mortgage, and paid the amount out of it. On the mortgage being paid off, the annuitant (a trustee) received the money and misapplied it. The annuity had been assigned, and the assignment recited the appropriation. The purchaser filed a bill against all the trustees, to compel them to pay the money misapplied, or for a resort to the residue to make good the same: Held, that there had been an appropriation; that the recital was binding on the purchaser as to appropriation; and that the purchaser had no claim upon the residue, the fund not having become deficient within the meaning of the will. *Barnett v. Sheffield*, 21 Law J. (N. S.) Chan. 692.

4. *Construction—Bequest to husband.*—A testator by his will bequeathed the sum of 700*l.* unto and amongst J. C. and C. his wife, and W. L., and in the same will bequeathed 200*l.* to W. L., and 200*l.* to J. C., and also 200*l.* to the said C. the wife of J. C.: Held, that the fund was divisible into two parts only, and not into three parts; and that one moiety belonged to J. C. and C. his wife, and that the other moiety belonged to W. L. *Re Wyld's Estate*, 22 Law J. (N. S.) Chan. 87.

5. *Same—Charge of debt.*—A testator bequeathed to A. all his policies of life assurance which he had effected in the U. and L. Life Assurance Companies, and to B. all his goods, chattels, and shares in public companies. The testator had shares in both the U. and L. Life Assurance Companies, but no policies; and had shares in other assurance companies: Held, that his shares in the U. and L. Life Assurance Companies did not pass to A. under the term "policies." *Moore v. Whittle*, 22 Law J. (N. S.) Chan. 207.

6. *Same—Condition—Direction to pay.*—A testator gave the residue of his estate to trustees upon the usual trusts, for conversion and investment, and directed them to pay such sums for the maintenance and education of his sons M. and N. during their minorities, or for

apprenticing them, as his trustees should think proper, and declared that when his sons should attain their ages of twenty-one years, his trustees should pay the then residue of the moneys unto his two sons, provided that they should be, in the opinion of his trustees, of competent understanding and sufficient discretion to manage and take due care thereof. M. and N. were both lunatic at the time of their attaining their majority: Held, that the qualification as to the sons being of competent understanding did not make the gift to them conditional, and that the testator's estate vested in them absolutely. *Wright v. Wright*, 21 Law J. (N. S.) Chan. 775.

7. *Same—Defective suit—Omitting to demur.*—A testator gave his freehold estate and property, whether real or personal, to M. S. for life; and after her decease, he gave all his said freehold estate and property to S. H. and his wife for their lives; and after their decease, he gave all his said freehold property to their children, for an estate of inheritance in fee-simple; but in case none should attain twenty-one, he gave his freehold estate and property to W. M., his heirs and assigns, in fee-simple. He charged his personal estate with the payment of several legacies, and the residue of what he should die possessed of was to become the property of M. S.: Held, that M. S. was entitled to the personal estate, and that S. H., his wife and children took no interest in the personal estate. A plaintiff whose case wholly fails, will not be allowed to perfect it by the gift or waiver of one defendant against another. If the case made by the bill is clear, a defendant who brought the cause to a hearing instead of demurring, was refused all costs, though he succeeded. Interest on balances may be charged against an executor, though it is not prayed by the bill. *Hollingsworth v. Shakeshaft*, 21 Law J. (N. S.) Chan. 722.

8. *Same—Die without leaving children.*—Bequest of a sum of money to trustees upon trust to pay the income to A. for life, and then to transfer the capital to the child or children of A. as tenants in common when they should attain their ages of twenty-one years; and in case any child die before his share should become payable, leaving issue, such share should go to his issue; and if any child should die before his share should become payable, leaving no issue, such share should go to the survivors; and in case A. should leave no child, then that the trustees should pay the same in the manner therein mentioned. A. had a child who attained twenty-one, and died in her lifetime: Held, that the legacy had absolutely vested in A.'s child. *Thompson's Trusts*, 22 Law J. (N. S.) Chan. 273.

9. *Same—Election—Heritable bonds.*—A Scotchman domiciled in England, and having real and personal estate here, and also real estate (heritable bonds) in Scotland, made his will in this country and in the English form, by which, "by virtue of every right, power, or authority enabling" him "in this behalf," he devised and bequeathed all his real and personal estate whatsoever and wheresoever, upon certain trusts, for the benefit of his children. It appeared that the will was wholly inoperative to pass real estate according to the law of Scotland: Held, affirming a decision of the Master of the Rolls, that the

eldest son (the heir-at-law according to the Scotch law) was not put to his election whether he would take the benefits given to him as one of the children of the testator in the real and personal estate in England, or would take the Scotch real property. *Maxwell v. Maxwell*, 22 Law J. (N. S.) Chan. 43.

10. *Same—Gift of dividends—Life interest—Enjoyment in specie.*—A testator gave the residue of his estate to trustees, upon trust to pay the dividends of 1,500*l.* Consols to A. for life, and after his death, to divide the dividends of the said sum equally between his wife E. B. and his niece F. R., or the survivor of them. The testator gave all the residue of his estate to his wife E. B. for life, with remainder to his niece F. R. for life, with remainders over. F. R. died: Held, E. B. was entitled only to a life estate in the 1,500*l.* Consols, and was not entitled to the principal. A testator gave the residue of his real and personal estate to trustees, upon trust to pay certain specified legacies, and then, as to all the rest, residue, and remainder of his freehold, copyhold, and leasehold estates, and all other his estate and effects, upon trust to pay the dividends, interest, rents, profits, and annual produce to his wife for her life. The testator at his death was possessed of leaseholds, shares in companies, and Dutch bonds: Held, that the widow was entitled to the enjoyment of the leaseholds in specie, but not of the shares or Dutch bonds. A testator directed his debts to be paid, and then gave all his real and personal estate to trustees upon trust to pay certain legacies, and then declared certain trusts of all the rest, residue, and remainder of his freehold estates, and all other his estate and effects: Held, that the personal estate was the primary fund for the payment of the debts and legacies, and that the real estate was only charged with them as a subsidiary fund. *Blaun v. Ball*, 21 Law J. (N. S.) Chan. 811.

11. *Same—Failure of issue.*—Bequest, by a will dated in 1819, of a sum of stock to trustees, upon trust to pay the dividends to A., the wife of B., for life, and after her death, if she should leave no issue living at her death, to B. for life; but if she should leave issue, then to pay a moiety of the dividends to B. for life, and the other moiety to be applied for the benefit of such issue as the trustees should think fit; and as to a moiety of the capital after the death of A., and after the death of the survivor of A. and B. as to the whole of the capital, to divide the same among the children of A., and if A. should die in the lifetime of B., leaving issue, and such issue should die in the lifetime of B., under age and unmarried, then to pay the whole of the income to B. for his lifetime, and after the death of the survivor of A. and B., and the failure of issue of A., to transfer the stock to C. A. died without issue, leaving B. surviving: Held, that by the word "issue" was meant children, and that by the words at the end of the will, "failure of issue," was meant failure of children. *Bryan v. Mansion*, 22 Law J. (N. S.) Chan. 233.

12. *Same—Gift by implication.*—A testatrix devised real estate to A. B. in fee; she then gave legacies, and devised the residue of

her real estate to C. D. for life, with remainder to his issue, with remainder to the first and other sons of A. B. in tail male, with remainders over. She then bequeathed the residue of her personal estate to trustees, upon trust for A. B., but if he should die in her lifetime, "without leaving any child or children him surviving," the residue was to be in trust for C. D. absolutely. A. B. died in the lifetime of the testatrix, leaving children: Held, affirming a decree of the Master of the Rolls, that the will did not create any trust, by implication, of the residue of the personal estate in favour of the children of A. B. *Lee v. Busk*, 22 Law J. (N. S.) Chan. 97.

13. *Same—Gift to a person generally, with a gift over of what remained at his death.*—A testator, by his will, directed his debts, &c. to be paid, and then gave, devised, and bequeathed all and every his estate and effects, whatsoever and wheresoever, to his wife, for her sole and separate use and benefit; and further gave, willed, and directed, that at her death, whatever remained of his said estate and effects should go to the persons therein named: Held, that the widow was entitled to an estate for life only in the residuary personal estate of the testator, after payment of his debts and funeral and testamentary expenses. *Constable v. Ball*, 22 Law J. (N. S.) Chan. 182.

14. *Same—Illegitimate child.*—A testator recited in his will that he had nine children, whom he named and described, and he bequeathed the income of his estate to his wife for life, and after her death, the capital to be divided among his children by his wife then living, and the issue of them who should then be dead. Various other trusts were declared by the will, and among them, that the trustees should pay the interest during the life of such of his said children as should be a daughter, in a particular manner. One of the daughters was illegitimate: Held (Lord Cranworth laying great stress on the latter clause, but the Lord Chief Justice considering the will sufficient without it), that the intention of the testator was on the will manifest, that the illegitimate daughter should take a share with the legitimate children. There is no inflexible general rule that illegitimate children cannot participate in a gift to children. *Owen v. Bryant*, 21 Law J. (N. S.) Chan. 860.

15. *Same—Issue.*—Bequest of personalty to A. for life, and after his death to the issue of the body of A. with a gift over, if A. should die without issue: Held, that at the death of A. all his issue, and not merely children, were entitled. *Hall v. Nalder*, 22 Law J. (N. S.) Chan. 242.

16. *Same—Issue of deceased child.*—A testator gave to trustees a sum of money on the usual trusts, for investment, and directed them to pay the income to A. for life, and after his death to divide the principal between the children of A. who should be living at the time of his (A.'s) death, and the issue of such as should be then dead leaving issue, so that the issue of such child so dying should take the part which their deceased parent would have taken if living,

to be paid to such children and issue upon their attaining, and in case they should live to attain, twenty-one. A. had a child, B., who died in his lifetime, leaving four children. Two of these children died in their infancy, in the lifetime of A.: Held, that the class to take was all the children left by B., and that the gift had vested absolutely in all those children. *Barker v. Barker*, 21 Law J. (N. S.) Chan. 794.

17. *Same—Legal estate—Securities for money.*—A testator, a mortgagee in fee of real estate, gave and bequeathed to A. all his moneys, securities for money, and all his goods, chattels, personal estate and effects whatsoever and wheresoever, to hold to A., his executors, administrators, and assigns, he paying thereout all his debts: Held, that the legal estate in the mortgaged property passed to A. *Re King's Estate*, 21 Law J. (N. S.) Chan. 678.

18. *Same—Lapse—Personal representatives.*—A. bequeathed a legacy of 5,000*l.* to B., with a declaration that if B. died in his lifetime, the legacy should not lapse, but should go and devolve on his personal representatives. B. died in A.'s lifetime, having by his will appointed C., his widow, and D., his executor and executrix, and giving all his personal estate to C., and leaving C. and three children his next of kin, according to the Statute of Distribution. C. and D. both proved the will: Held, that C., in her own right was alone entitled to the legacy of 5,000*l.* On the hearing of a petition relating to the disposition of a trust fund, it appeared that A. had an interest in it, which might be asserted. A. died in the United States, having by his will appointed B. his executor, who proved the will there, but not in this country. Counsel appeared for B. at the hearing. The Court at the hearing, under the 15 & 16 Vict. c. 86, appointed B.'s counsel to represent B.'s estate. *Hewitson v. Todhunter*, 22 Law J. (N. S.) Chan. 76.

19. *Same—Misdescription.*—A testator, by his will, gave his daughter A., so long as she should continue unmarried, all his copyhold estates, situate at P., and also all his live and dead stock, furniture, moneys, and securities for money, after the payment of his just debts, funeral expenses, and the costs of proving his will, and declared that if A. should be married after his death, or die unmarried, the whole of the estates, with the live and dead stock, furniture, and goods whatsoever, should be sold, and the proceeds arising therefrom be divided between B., C., and D.: Held, that the testator had charged his copyhold estates with the payment of his debts. *Waters v. Wood*, 22 Law J. (N. S.) Chan. 207.

20. *Same—Moneys.*—A testator, by his will, appointed A. and B. to be his executors, to take and receive all moneys that might be in his possession, or due to him at the time of his death, to be by them placed in the Funds, or otherwise laid out on security, the interest thereof to be paid to his wife for life, and directed them, after her death, to divide the moneys held in trust by them between his two nieces. The testator had at his death only a small balance at his banker's and the sum of 1,200*l.* Consols: Held, that the Consols were

disposed of by the will under the term of moneys. *Waite v. Combes*, 21 Law J. (N. S.) Chan. 814.

21. *Same—Power of sale—Devise of trust estates.*—A. devised freehold and leasehold estates to B. and C., their heirs, executors, administrators, and assigns, with a power for B. and C., or the survivor of them, his heirs, executors, and administrators, to sell the devised property. A. survived B. and died leaving C. his heir at law, and having by his will devised all his trust estates to C. and D., and appointed them his executors: Held, that neither C. alone, nor C. and D. together, had the power of selling estates devised by A. *Wilson v. Bennett*, 21 Law J. (N. S.) Chan. 741.

22. *Same—Repairs—Tenant for life—Remainderman.*—A testator gave all his real and personal estate whatsoever to his wife and son, whom he appointed executrix and executor, upon trust to permit his wife during her life to receive the clear rents, issues, and profits, interest, dividends, and annual proceeds thereof, subject to all outgoing; and upon the death of his wife, then, as to all his said devised and bequeathed freehold and residuary, real and personal estate, with their appurtenances, and of which his wife was to have the clear yearly income for her life, upon trust for his son absolutely: Held, that certain leaseholds belonging to the testator were to be held by his widow in specie, no intention of conversion being expressed. Shortly after the testator's death, his widow was called upon to make good the dilapidations to the leaseholds, under a covenant in the lease: Held, that these expenses, which the widow had paid out of her income, were properly chargeable upon the corpus of the estate. *Harris v. Poyner*, 21 Law J. (N. S.) Chan. 915.

23. *Same—Tenant for life.*—A testator, by his will, bequeathed all the residue of his real and personal estate to his executors, upon trust to pay his wife the income and profits thereof so long as she should continue his widow. A part of the personal estate of the testator, at his death, consisted of a debt of 12,000*l.*, payable by annual instalments of 1,500*l.*, with interest at 5*l.* per cent. from the death, on the debt, or such part as for the time being should remain unpaid: Held, that the tenant for life was entitled to 4*l.* per cent. on the debt, or such part as should remain unpaid, and that the other 1*l.* per cent. ought to be invested for the benefit of the tenant for life and those entitled in remainder. *Meyer v. Simonson*, 21 Law J. (N. S.) Chan. 678.

24. *Same—Testamentary instruments—Conflict—Revocation by inconsistent disposition—Incomplete devise.*—W. B. by a will dated the 5th of October, 1837, gave all his property, real and personal, to trustees, to be divided between C. S. and the three boys of W. W. By another will, dated the 13th April, 1838, he gave his household goods to C. S., and he gave all his real estates to her for life, with remainder to W. W. for life, and after the decease of both, to W. and G., the sons of W. W.; and by another testamentary instrument, dated the same day, he appointed C. S. and W. W. his executors. By another instrument without a date, the testator gave his real

estate to trustees, to divide the rents into three portions, and pay one-third to C. S. for life; as to the other two-thirds, to all the children of W. W., to permit him to receive the rents for their maintenance, &c., until their arrival at twenty-one. The testator then directed his trustees out of the rents to pay his debts, &c., and the costs of executing the trusts of his will: Held, that revocation by inconsistency of disposition will only affect the prior will to the extent that such inconsistency deposed is operative; that the fourth will revoke the first altogether, and the second so far only as it related to real estate; that by the fourth will two-thirds of the real estate were devised to the children of W. W. in fee-simple; that the remaining third was given to C. S. for life; and that the reversion in fee in *such* third was undisposed of and passed to the heir-at-law of the testator, but charged with debts, legacies, &c., in exoneration of the testator's personal estate. *Plenty v. West*, 22 Law J. (N. S.) Chan. 185.

25. *Same—Vesting legacies charged on land.*—A testator devised real estate to A. in fee, charged with an annuity to B. for life, and directed that, after the death of B., the estate should be charged with the repayment of 100*l.* apiece to X., Y., and Z., and that the same should be paid to them respectively, within six calendar months after the death of B., or such of them as should be then living. X. died in the lifetime of B.: Held, that the legacy to X. had not vested, and was not payable to his representatives. *Goodman v. Drury*, 21 Law J. (N. S.) Chan. 680.

26. *Devise to children—Revocation—Entail—Residuary personal estate.*—Devise to the children of A. held not to be revoked by an expression in a codicil that they were not intended to take any beneficial interest under the will or codicil. A testator devised his real estate to his brother William for life, with remainder to his first and other sons in tail, with remainders over; and he bequeathed his residuary personal estate between his nephews and nieces. By a codicil he revoked his will so far only as it was altered by the codicil, and he gave to his nephews and nieces, except (as he said) his brother William's children, who are not intended to take any beneficial interest under his will or this codicil, 1,000*l.* each: Held, that the devise to the children of William was not revoked. *Cleobury v. Beckett*, 14 Beavan, 583.

27. *Devise in trust—Remainder to children—Gift over.*—Devise in trust for A. for life, with remainder to any of his children, as he should appoint. At the date of the will A. had no child, but at the death of the testator he had a son, B., three years old. A. by will appointed to trustees and their heirs, in trust for B. and his heirs, and to be conveyed to him at twenty-three, with a gift over to other sons if B. died under twenty-one, and he directed the rents to be accumulated until B. or such other sons should attain twenty-three, and then pay them over: Held, that the gift was not too remote, and that the direction to accumulate was valid. *Peard v. Kekewich*, 15 Beavan, 166.

28. *Devise and bequest to trustees—Remainder to heirs and assigns of testator ex parte maternâ.*—Devise and bequest of real and personal

estate to trustees, upon trust for the testator's daughter, for her life (with power of sale on her consent), and, after her decease, for such person or persons as his daughter should by will appoint; and in default of such appointment, a devise and bequest of such real and personal estate to the testator's heirs and assigns *ex parte maternâ*, as if he had died intestate; and power (by a codicil) to sink any part of the personal estate, or proceeds of the sale of the real estate, in the purchase of an annuity for the daughter: Held, upon a claim of the daughter against the trustees for the conveyance of the real estate to her, that the heir *ex parte maternâ* was the heir at the death of the testator, and that the daughter was such heir, and the Court directed a conveyance to her accordingly. *Rawlinson v. Wass*, 9 Hare, 678.

29. *Devise—Gavelkind tenure—Payment of debts—Entail—Tenancy for life.*—J. M. by his will devised the Maytham Hall estate, being of gavelkind tenure, to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto, upon trust for P. M. for life; and after his decease, for the first son of P. M. for life; and after his decease, for the first son of such first son, and the heirs male of his body; and in default of such issue, for every other son of P. M. successively, for the like interests and limitations; and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. M. for life; and after his decease, for T. G. M., the eldest son of T. M., for life; and after his decease, for the first son of T. G. M. and the heirs male of his body; and in default of issue of the body of the said T. G. M., for every other son of T. M. successively, for the like estates and interests; and on failure of all such issue of the body of T. M., upon trust for him, his heirs and assigns, for ever. P. M. never had any children: Held, that P. M. took an estate for life, with remainder to his first unborn son, if such son had been born; and that all the remainders over were void: Held also, that effect was to be given to the gift over to T. M. and his sons, in default of issue of the body of P. M. &c. as an independent clause, and that it was consequently valid. Although by the doctrine of *cy pres* or by implication, as applied to the construction of a will, an estate may be carried otherwise than in the exact form and manner indicated by the testator, yet it must always be in favour of a class, or part of a class, of persons intended to be provided for by the testator. In construing wills, effect may in certain cases be given to the general intent, at the expense of a particular intent; but this is not to be done without an actual necessity. Where an estate is so limited to A. as would generally raise by implication an estate tail, but there are added limitations to the children of A. which are void for remoteness, it is not a general rule to reject these limitations as unimportant, and to give to A. an estate tail, although cases may arise in which this would be done in favour of the clear intention of the testator. The cases of *Pitt v. Jackson*, 2 Bro. C. C. 51, and *Nicholl v. Nicholl*, 2 W. Bl. 1159, observed on. Where there are gifts over which are void for perpetuity, and there is a sub-

sequent and independent clause on a gift over, which is within the line of perpetuity, effect cannot be given to such clause unless, it will accord with previous valid limitations. A gift over made in words comprising only one event, will not be construed as made on two events, although, in point of fact, it may consist very reasonably of two branches, unless it is so expressed by the testator. *Money Penny v. Dering*, 2 D. M. & G. 145.

30. *Legacy—School*.—A bequest of a legacy to be applied towards establishing a school at A., provided a further sum could be raised in aid thereof, if necessary, Held, to import an intended outlay of the sum in building a school-house at the place referred to; and therefore to be a void bequest, within the Statute of Mortmain. *Attorney-General v. Hale*, 9 Hare, 647.

31. *Legacies to children—Maintenance during minority—Contingencies*.—Legacies of 1,000*l.* each to the three children then living of A., the testator's daughter, with a proviso for the payment of the interest for their maintenance during minority, and a bequest of 2,000*l.* to trustees upon trust for A. for her life, and from and after her decease, for all and every her children living at her decease, equally to be divided, with a proviso, that if any one or more of the children of A. should die under twenty-one without leaving issue, the original and accrued legacies and shares bequeathed to the child or children so dying, should go to the others and other of the said children equally; and a declaration, that if all of the children of A. should die under twenty-one, and without leaving issue, the legacies of 1,000*l.* apiece should not be raiseable; but from and after the decease of the last surviving child, the said legacies, and from and after the decease of her daughter, the 2,000*l.* should sink into the residue: Held, that the rights of the children of A. in the legacy of 2,000*l.* were contingent upon their surviving their mother. Some of the reasons which have influenced the Court in decisions in favour of vesting legacies in children, have no application in the case of grandchildren, where there is nothing to show that the testator had placed himself *in loco parentis*. *Farrer v. Barber*, 9 Hare, 737.

32. *Power of sale—Defect—Release of cestuis que trust*.—A testator gave a power of sale to two trustees, and the survivor, his heirs, executors, and administrators: Held, that a title dependent on a sale by the devisee in trust of the survivor, was too doubtful to force on a purchaser; and secondly, that a defect was cured by the release of all the *cestuis que trust* to the representatives of the surviving trustee. Consideration of the cases of *Cook v. Crawford* and *Titley v. Wolstenholme*. *Macdonald v. Walker*, 14 Beavan, 556.

33. *Residuary estate—Power of sale—Payment of debts*.—A testator, by his will, after appointing three persons his executors, gave to them the residue of his personal estate, and directed them, or other the trustees to be appointed under the provisions contained in his will, to stand possessed of his residuary personal estate, upon trust, at such time or times as to them should seem meet, to sell and convert into money all such part thereof as should not consist of money,

and invest the produce in securities, and to stand possessed of the same upon trust thereout to pay his funeral expenses and debts, and certain large legacies which he specified, and to stand possessed of the residue for his two sons equally; and the will contained a clause, which, according to the construction put on it by the Court, empowered the trustees to give receipts. Sixteen years after the death of the testator, the then acting trustees of the will, who were not the executors, raised money upon a deposit of the title-deeds of two leasehold houses, part of the testator's residuary estate: Held, dismissing a claim filed by the mortgagors to enforce their securities, that inasmuch as the trusts of the will showed a conversion out and out of the testator's property to be absolutely necessary, the trustees were not authorized in raising money by mortgage. A power of sale out and out, and having an object beyond the raising of a particular charge, does not authorize a mortgage; but where the power is for raising a particular charge, and the estate is settled or devised subject to that charge, it may be proper to raise the money by mortgage, and such a mortgage will be supported as a conditional sale. Where a trust is created by will for the payment of debts and legacies, a purchaser or mortgagee is not bound to see to the application of the money raised; the principle referable to such a case being, that the testator has shown his intention to be to intrust the trustees with the power of receiving and applying the money. Persons, however, who deal with trustees raising money at a considerable distance of time, and without apparent reason for so doing, are under an obligation to inquire and see that no breach of trust is being committed. Distinction in reference to the raising of money not apparently for the payment of a charge, between the case of a man who is owner as well as trustee, and that of a man who holds the property merely as trustee, subject to a charge. Clause in a will enabling trustees to give receipts in a particular case specified, construed in favour of the intention of the testator to confer a power to give receipts generally. *Stronghill v. Anstey*, 1 D. M. & G. 635.

34. *Revocation—Conveyance of equity of redemption.*—A testator, by his will, gave to A., a married woman, an annuity for her life, for her separate use, and by a codicil, gave to A., in addition to the legacy mentioned in his will, the sum of 300*l*. No legacy had been given to A. by the will: Held, that A. was entitled to the 300*l*. for her separate use. *Plowden v. Hyde*, 21 Law J. (N. S.) Chan. 796.

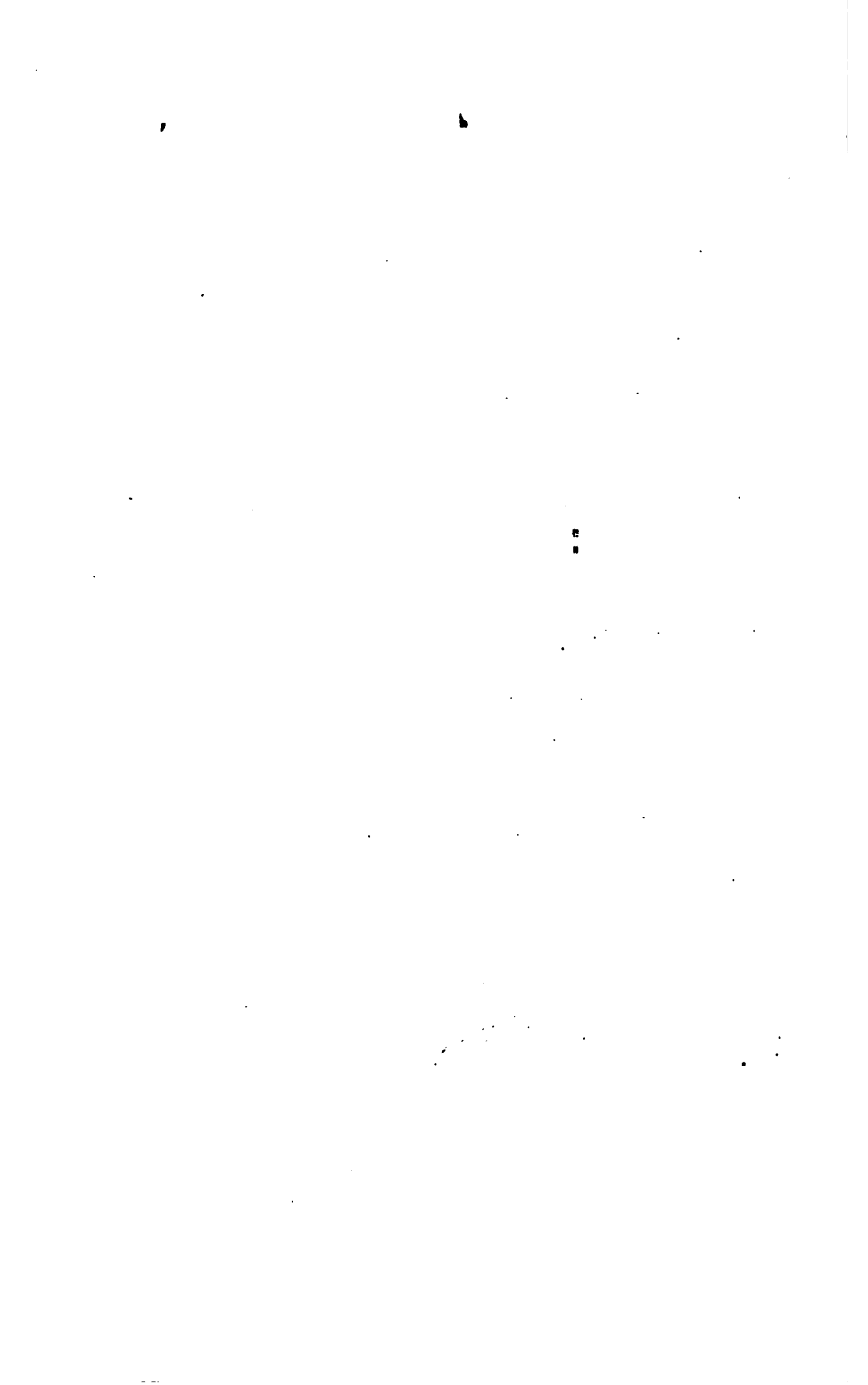
35. *Special case—Legatees—Charge upon real estate.*—The rule, where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both,—that the legatees whose legacies are so charged, shall be paid out of the land, in order to leave the personal estate to those who have no other fund, applies equally to the case where one of the legacies only is charged upon real estate. The Court does not construe a charge upon real estate of one only of several legacies, if the personal estate should not be sufficient, as

intended for the exclusive benefit of that legatee, but construes the intention of the testator to be, that all his legacies shall be paid, and therefore that the charge is to take effect, if the personal estate be insufficient for the payment of all the legacies. *Scales v. Collins*, 9 Hare, 657.

36. *Tenants in common—Special case.*—A testator gave his real and personal estate to A., B., and C. as tenants in common. By a codicil he declared that if any of the devisees should die in his lifetime, his estate and interest should go to the survivors, or survivor of them, and the heirs, executors, administrators, and assigns of such survivor. A. died in the testator's lifetime: Held, that B. and C. took, as joint tenants, the share intended for A. *Leigh v. Mosley*, 14 Beavan, 605.

37. *Trustee Act—Dividends of stock—Life interest—Dividends to accrue.*—The person entitled for life to the dividends of stock held in trust, requested in writing two executors of a sole deceased trustee, in whose name the trust stock was standing in the bank books, to receive the dividends, and they made default for twenty-eight days in doing so. Upon the petition of the person entitled for life to the dividends, the Court declared that the right to receive the dividends which accrued due prior to such request, was vested in the petitioner; but held, that it had no authority to make any order as to any dividends accrued, or to accrue, subsequent to the date of the request. *Re Hartwell, ex parte Hodges*, 5 D. & S. 111.

WINDING-UP ACTS.—*Contributory—Allottee—Committee-man.*—At a meeting of the managing committee of a provisionally registered railway company, at which A. and B. were present as members, it was resolved that the shares of the company should be allotted according to a certain scheme, by which 500 shares were to be allotted to each member of the managing committee, under the head of "reserves." In fact 100 shares only were allotted to and accepted by A. and B. respectively, and for that number only they signed the parliamentary contract. On the winding up of the company, the Master placed A. and B. on the list as contributories in respect of 500 shares each: Held, upon appeal, that A. and B. were liable in respect of the 100 shares only, and that the reservation of the 500 shares in their favour did not amount to a contract binding upon them to accept that number of shares. *Oxford and Worcester Extension and Chester Junction Railway Company, ex parte James and Sharpe*, 21 Law J. (N. S.) Chan. 767.



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